The Making and Working of the Indian Constitution

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SHIBANI KINKAR CHAUBE

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Indian Constitution

India–The Land and the People

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SHAIBANI KINKAR CHAUBE

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To
Sonali, Soumen and Amartya

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PREFACE

Four decades ago, I studied the Constituent Assembly of India and the framing of the Indian constitution for my doctoral degree from the University of Calcutta, the result of which was first published 35 years ago. The present work is the product of further research and teaching notes over the period, some results of which were published in edited books, journals and daily newspapers.

This book is not a lawyers' manual. Indeed, hard-boiled lawyers may find very little that is attractive in this volume. It is the work of a political scientist that may attract students of political science and general readers who understand more politics than law. Conscious effort has been made to use legal jargons to the minimum extent and references to articles of the constitution as well as relevant civil laws have been kept at the unavoidable minimum.

The guiding conviction of this work is that a constitution is as much politics as it is positive law. Now that the constitution of India has worked for nearly six decades, we take a modest satisfaction over the fact that India's is the only constitution in the developing world that has lasted so long. Let it also be noted that the reason behind the survival of a constitution is, in fact, more political than legal.

SHIBANI KINKAR CHAUBE

I

CONSTITUTIONAL GOVERNMENT AND DEMOCRACY

The world's first political scientist, Aristotle, in his famous book on *Politics*, defined a constitution in two ways: descriptive and normative. In the first way, he defined a constitution as 'the arrangement of magistracies in a state, especially of the highest of all.' Elaborating it further he said,

> The government is everywhere the sovereign in the state, and the constitution is in fact the government.

Elsewhere in the same book, however, he brings in the normative aspect of a constitution:

> A constitution is the organization of offices in a state and determines what is to be the governing body, and what is the end of each community. But laws are not to be confounded with the principles of the constitution; they are the rules according to which the magistrates should administer the state, and proceed against offenders.

He also said that 'when the citizens at large administer the state for the common interest, the government is called by the generic name – a constitution.' Aristotle calls such a form of government a 'constitutional government' or a 'polity.' Aristotle, like his contemporaries, detested democracy.

The modern concept of constitutionalism springs out of the normative meaning. It dictates that the government follows

the constitution, that all its powers be derived from the constitution, and nothing else, and that, beyond the powers sanctioned by the constitution, the government has no power. The greatest exponent of this modern concept of constitutionalism was John Locke, the 17th century political philosopher and ideologue of the glorious revolution in England in 1688 that established a constitutional monarchy there. It is not necessary that a constitution has to be written; England does not have a written constitution. The main idea is to have a limited government, more specifically, a limited executive, for the executive is where the real powers or functions of government rest.

Subsequently, the idea of a limited government got more depth. Even the power of the legislature came to be limited and the judiciary was assigned increasing autonomy and authority over governmental affairs. A democratic government has come to mean a people's government and a constitution has come to define the relation of the people and the governmental institutions. This gave rise to a theoretical dilemma.

To Aristotle, every good government has to be constitutional, that is, limited. His personal preference was for a mixed form of government lying between the government of the many (democracy, polity) and the government by a few (oligarchy, aristocracy). It was Rousseau, the philosopher of the French revolution, who set up the dilemma. Can a democracy, where *all* people rule themselves, be limited?

John Locke considered the people as the political (i.e., ultimate) sovereign. Rousseau firmly believed in direct popular sovereignty, so much so that he would not brook even a representative government and, in order to provide the people with the opportunity to directly take part in legislations and deliberations, would advocate a mobile legislative body. Rousseau would not allow the government (i.e., the executive)

any autonomy. It was only the instrument to carry out the decisions of the general will of the people. There was no question of limiting the general will; there was no question of a limited government.

During the second phase of the French revolution (August 1792), the commune of Paris showed some resemblance with Rousseau's model. But the revolution failed. Neither post-revolution France, nor any other large state, could, or would try to, follow Rousseau. Governments survived. Democratic governments became representative as well as constitutional. But the dilemma survived too in the claims of the representatives of the people to governmental power with regard to legislation and policy making. One of the reasons of variation in governmental forms in today's democratic world is this dilemma.

There are two major types of constitutional government today; the parliamentary and the presidential. The United Kingdom of Great Britain and Northern Ireland has no written constitution as such but has a parliamentary government where the King in Parliament is supposed to be sovereign. In practice, parliamentary sovereignty there is qualified. The United States of America, having a written and rigid constitution, follows a presidential system defined by separation of powers between the three organs of government. In practice, a great deal of interaction takes place among the organs.

The original normative idea of a constitution was, in any case, to end arbitrary government of either a monarch or an assembly. This, by implication, would protect the rights and interests of the people. In fact, the British people consider the *magna carta* of 1215 as the first and most important source of their rights even though it merely bound the king not to detain any person without trial and not to levy a tax without consulting the lords spiritual and lords temporal. The *magna carta* remained more as a symbol than as a practical proposition

until the bill of rights sanctioned by the King in Parliament in 1688. The rights of the British subjects took centuries to grow stage by stage. The United States of America, which came into being in 1789, amended their constitution in 1791 to incorporate a body of rights that the government was expressly forbidden to violate. The succeeding democratic constitutions of the world made it a practice to write their constitutions and include their fundamental rights in the document.

A significant point about constitutionalism is that a constitution does not fall from the blue. It is not God-given. Nor is it granted by a benevolent ruler, because no ruler would like to reduce his own power. A constitution is framed by the will of the people or wrested from a ruler; it grows out of the experience and the aspirations of a people.

Yet, a constitution does not look to the past. It is only in the traditional societies that people look to the past – the prevailing custom and wisdom – for guidance. People want a constitution to determine the course of their future. Making a constitution is different from codification of (the prevailing) laws. It involves a break with the past norms. It is one of the fundamental principles of positive law that a constitution overrides all customs, traditions, rules or statutes that come in conflict with it. It is the supreme law of the land.

Historically, constitutionalism has been an instrument in fighting arbitrary powers not only native but also alien. The British colonies of North America, when they got disgruntled with the 'home' government, first tried to limit the powers of the colonial governors appointed by the British King in Parliament and then to limit taxation by them under the laws of British parliament. The people revolted when their petitions and protests fell on deaf ears. Thus, constitutionalism became an integral part of the struggle against colonialism and imperialism.

In India it began with the demands for increased

representation of Indians in the imperial legislative and executive bodies. Towards the end of the 19th century the demand for a round table conference of Indian political parties and interests to frame a constitution for India within the British empire was raised. This demand was based on the model of government in the white colonies of Britain like Canada and Australia. In 1929 the Indian National Congress, in fact, demanded the 'dominion status', as of Britain's white colonies, for India. In 1930 the demand rose to the level of complete independence. In 1934 the instrumentality of its achievement was spelt out: a Constituent Assembly.

The idea of a Constituent Assembly was alien to the British law. It grew in the revolutionary countries of North America and France. Leaders of revolutions, after their success, framed constitutions through representative assemblies. The Philadelphia Constitutional Convention of 1787 framed the constitution of the USA. The French National Assemblies of 1789 and 1792 framed constitutions of a limited monarchy and a republic respectively. It is a different matter that the constitution of the USA outlasted two centuries; the French constitutions did not last long. Survival of a constitution depends not only on its internal coherence and strength, but also upon historical factors.

A constitution is not a memorandum of association that always contains a provision about the consequences of the termination of the association. No constitution in history has provided for that. Every constitution is based on an expectation of permanence. Yet every constitution has laid down procedures for its amendment according to the changing needs of time.

A constitution is, after all, a political endeavour by or on behalf of a community. No human endeavour can be perfect. No institution or law can be perpetually stable. That is why constitutions leave in their bodies provisions for amendment. But, besides amendment, there are several methods by which

a constitution grows.

The constitution of the United States of America, for instance, was a skeletal one; it had only seven articles. The constitution of India is, on the other hand, the bulkiest constitution in the world. Both of them leave scope for enactment of legislation detailing and supplementing the main articles. Thus, the US congress has been empowered by the constitution to determine the clustering of the electors and the day in which they would give their votes (Art. II, Section 1 of the US constitution), legislate on the abolition of slavery (Art. XIII), ensure personal freedom of citizens (Art. XIV), ensure right to vote of the citizens (Arts. XXV and XIX), establish subordinate federal courts (Art. III, Section 2), and allow admission of new states into the federation (Art. IV, Section 3). The Indian constitution, likewise, has vested in Parliament the power to admit into the Union, or to establish, new states (Article 2), form new states, alter their boundaries, or rename the states (Art. 3), to alter the number of judges of the Supreme Court (Art. 124, Clause 1), to lay down the procedure of election (Art. 327), etc.

Conventions have resulted in substantial supplementation and modification of constitutions. Conventions are long-established practices which have come to be regarded as inviolable. The role of conventions is, of course, most critical in the political set up of the United Kingdom. But they are significant also in the constitution of the USA. Thus, the growth of party system has substantially altered the procedure of election of the Vice-President there. The powerful committee system in the US congress is entirely conventional. The constitutional requirement that the President, from time to time, shall give the congress information on the state of the Union (Art. II, Section 4) has been turned into the annual presidential address to the congress. He has even developed the practice of meeting members of the congressional

committees. Thus, the rigour of separation of power has been diluted.

In all democratic countries the judiciary decides disputes on the basis of law. While so doing they interpret law. Such interpretation has occasionally led to the expansion, or contraction, of law. Judge-made laws have occasionally resulted in substantive modification of the constitutional provision, especially in respect of fundamental rights of the people. The Indian judiciary is no exception

After independence, the constitution of India with its fundamental rights and directive principles of state policy gave a new direction to law reform geared to the needs of a democratic legal order in a plural society. Though the constitution stipulated the continuation of pre-constitution laws (Art. 372) till they are amended or repealed, there had been demands in Parliament and outside for establishing a central law commission to recommend revision and update the inherited laws to serve the changing needs of the country. The government of India reacted favourably and established the first law commission of independent India in 1955 with the then Attorney-General of India, M. C. Setalvad, as its chairman. Since then the successive law commissions have been reviewing the constitutional law and the statutory laws of the country.

The law commission, however, is a minor source of amendment of the constitution. The first amendment of the Indian constitution took place shortly after its working for one year. Most of the amendments are the result of administrative and political needs which are ever a-changing. But the primary reason of the staggering number of amendments so far (94 till date) is the length of the constitution and the details laid down with a view to reducing executive and judicial maneuverability with mixed results. All amendments are drafted by the Ministry of Law and passed through prescribed procedures.

Fortuitously, the Indian constitution lasted nearly six decades. Compared to the other post-colonial states, or even a European country like France, this is a moderately satisfactory record. In the following pages we shall examine the structure and strength, as well as weakness, of the constitution of India.

II

THE ANTECEDENTS

The constitution of India that was proclaimed on 26 January 1950 was framed by a Constituent Assembly that worked for nearly three years, from 9 December 1946 to 26 November 1949. At its background lay a long chain of events stretching over nearly two centuries. The British East India Company, which had arrived in India early in the 17th century, set its political foot over Bengal in 1757. Within the next hundred years it came to control directly two-thirds of the Indian soil and indirectly over the rest. In 1858, the British Queen in Parliament took over the administration of the territories at the possession of the company. In 1877, Lord Lytton, the Viceroy and Governor-General of India, proclaimed queen Victoria the Empress of India.

In the 1858 proclamation, the queen had promised her Indian subjects equality of status with the subjects elsewhere in the empire. As if to fulfill this promise the British passed the Indian Councils Act in 1861 thinly extending the councils of the Governor-General and Governors by nomination of a handful Indians – mostly, *maharajas, rajas* and *zamindars* – for consultative purposes. The Indian Councils Act of 1892 extended the participation further. The system of nomination remained in place though some of the nominated Indians were allowed to have been elected by a highly restricted electorate. Though the idea of an Indian representation may be said to have been sown by the imperial rulers of India at this stage,

the system of election at the provincial and the central/imperial levels was officially established in the Indian Councils Act of 1909. Simultaneously, the system of separate electorate was established at the levels of the imperial and the provincial councils.

Separate electorate, as such, had, however, been established in India as early as in 1883, when the local governments were made elective under the Ripon reforms. Lord Ripon had visualized elective local government to be training ground of the Indians in self-government. Ripon is believed to have been personally opposed to separate electorate; but he gave in to pressure of the bureaucrats.

The Royal Commission on Decentralization (1908) certified that the experiment had succeeded and recommended the extension of the system of elective representation to provincial legislatures. An attempt was made in 1915 to incorporate the recommendation in a Government of India Act. But World War I and the nationalist movement hastened the pace of change. The Government of India Act, 1919, brought in real, but restricted, representation of Indians in the government. Simultaneously, separate electorate was expanded.

In 1919, there was a hesitant move to introduce the principle of responsible government at the provincial level in the form of a diarchy in which a few ministers were made responsible to the provincial legislature whereas the executive councilors were kept accountable to the Governors. The major political parties of India rejected it. The national movement forced the rulers to concede more self-government to the Indians. The result was the passage of the Government of India Act, 1935, and its enforcement in 1937. The Indian National Congress participated in it till the outbreak of World War II and, again, after the war was over, at the provincial level. At the time of transfer of power in India this Act was in operation.

Meanwhile, for different reasons, two problems had

acquired salience in Indian politics. The communal division, partly fostered by the British government in pursuit of a divide and rule policy, had become quite intense. The Government of India Act, 1935, created 18 separate and special electorates. But the communal problem went much ahead of the question of electorates. It raised the question of governmental power. To solve the problem the Nehru Committee report emanating from the all-parties conference in 1928 advanced the formula of federation with provincial autonomy and the Simon Commission agreed to that. But, although the major political parties agreed to work at the provincial level, they did not accept the federal government which was patterned after diarchy. The princely states were invited to join the federation. Apprehensive of losing their autonomy, the princes too declined to join the federation. The federal scheme failed.

After World War II, Britain was no longer in a position to continue to rule by repression. In March 1946 a Cabinet Mission under Sir Pethick Lawrence arrived in India to draw a scheme of transfer of power in consultation with the major political parties and interests. The Cabinet Mission drew up the scheme of a Constituent Assembly to be constituted partly by elections from the provincial legislatures and partly by representation of the princely states. It was proposed that the Constituent Assembly would be summoned by the Governor-General, and the draft constitution prepared by the Constituent Assembly would be submitted to the British parliament for enactment in the way that Britain's white colonies had earlier done.

While paying lip service to the principle of provincial autonomy, the Cabinet Mission, however, severely undermined the principle. It toed the Muslim League line of the two-nation theory by proposing grouping of provinces on communal basis and upheld the right of a province not to join a particular group of provinces. And, that too, in a questionable way. The

Cabinet Mission divided the representatives of the British Indian provinces into three sections corresponding to the provinces. Two sections representing the north western provinces of Punjab, Sindh, Baluchistan and North-West Frontier Province and the eastern provinces of Bengal and Assam were marked as Muslim-dominated groups. The rest of British India – in the north, centre and south – was marked as one Hindu-dominated – 'general' group. It was laid down that, immediately after the Constituent Assembly met, its members would split into separate sections as laid down above and would decide if they would form group constitutions or not. If they so decided, the group constitution would be formed first. And only thereafter the provincial and union constitutions would be framed.

The Muslim League's demand for Pakistan covered exactly these provinces. The Indian National Congress saw it to be effectively conceding Pakistan to the jeopardy of a united India. The Congress objected to the substitution of the hitherto canvassed provincial autonomy by the substance of Pakistan. It also pointed out that Assam was not a Muslim-majority province. But, her banding with Bengal made the eastern group as a whole Muslim-majority. Further, the Muslim-majority North-West Frontier Province was being ruled by the Congress party and was opposed to grouping. The irreconcilability of the two positions resulted in partition of British India.

Partition not only reduced the strength of the Constituent Assembly of India but altered the course of its deliberations. In the first place, it drastically reduced the representation of the Muslim League. Consequently, the predominant concern with provincial autonomy was abandoned. In the third place, the concepts of political minorities and separate electorate were buried. More important, the Constituent Assembly decided to establish a republic. The Indian Independence Act that had been passed by the British parliament in July 1947 set up two

'independent dominions' of India and Pakistan. The concept of independent dominions was more advanced than that of dominions that had been established in the white colonies of Britain like Canada and Australia. But, according to the 1947 Act, unlike in Canada, the council of ministers of an independent dominion would not be treated as a part of the British Queen's privy council. India and Pakistan would be dominions all the same, under a Governor-General appointed by the British crown. The Constituent Assembly of India did away with this vestige of colonial rule. India would have an elected head of government.

This revolutionary transformation of the Indian polity was sealed by an extraordinary step taken by the Constituent Assembly. The white colonies earlier got self-government by drafting bills to that effect in their own consultative committees/conferences. The drafts so enacted were submitted to the British parliament for enactment. Thus the constitutions of the erstwhile dominions were sanctioned by the British crown in parliament. The Indian Independence Act, on the other hand, gave the Governors-General of the dominions plenary power to give assent to the legislations passed by their Constituent Assemblies. As in the British system there is no difference between an ordinary law and a constitutional law, it would mean that the Governor-General would give his assent to the constitution submitted to him for assent. In fact, the intention of the Indian Independence Act was that the draft constitution of India would be submitted to the Governor-General of India, the representative of the British crown in parliament. The Constituent Assembly of India, however, did not submit the draft even to the Governor-General for assent. The constitution of India was proclaimed after the authentication of its President. By one stroke India severed her bondage to the British crown and became a republic.

The Constituent Assembly of India worked for nearly

three years from 9 December 1946 to 29 November 1949. The constitution was proclaimed on 26 January 1950. A great achievement of this period was the integration of 554 princely states with India by means of negotiation, persuasion, pressure and, in a few cases, armed action by the government of India. The princes adopted the constitution of India. In course of time their status and privileges were levelled with those of the other citizens of India.

The fact that framing the constitution of India took nearly three years to complete would show that it was not a smooth affair. There were strong oppositions to different parts of the constitution from different sections of the people. The stoutest opposition was offered by the members belonging to the Muslim League who continued in the post-partition Constituent Assembly of India, who feared that the overwhelming majority of the Congress party was leading the country towards a Hindu state. They wanted to retain the political status of minorities as in the British days through various means. The native princes were reluctant to join a republican democracy that was envisaged by the Congress. There was a criticism of the radicals and socialists on the point that the Constituent Assembly, summoned by Governor-General, Lord Mountbatten, was not a sovereign body and the Constituent Assembly had not been representative of the whole people. We shall deal with the criticisms and reservations one by one.

The Muslim League members lost their case with the partition of India. That tragedy gave the bulk of the members of the Constituent Assembly the determination that the status of political minority must be ended. Hence, the abolition of separate electorates and reservation in services for the minorities prevalent since the British days. Having failed in retaining the system of separate electorate the League members of the Constituent Assembly advocated the system of proportional representation. They even unsuccessfully opposed

a parliamentary system of government as, they thought, it would give the Congress a 'brute majority,' and advocated a Swiss-type collegial executive.

The Indian Independence Act terminated British paramountcy on the princely states making them technically independent. They were, however, advised to join in one of the dominions (India and Pakistan) through negotiation. The princes were apprehensive of losing their powers and privileges in the new set-up. On the other hand, the states people's movements were agitating for democratic rights strengthening the cause of the integration of the states with India.

However, the last objection was critical as it related to the very origin of the constitution of India and its legitimacy. It is true that the Constituent Assembly of India did not start off as a sovereign body. It is also true that the Constituent Assembly was not constituted through universal adult franchise. As to the first drawback the answer is that, although the assembly had been summoned by the British Governor-General, after the partition of British India was settled, the Governor-General never interfered with the constitution-making work. In fact, the Constituent Assembly worked in two capacities: (1) as the constituent body, and (2) as the legislative body. They sat separately. The bills passed by the assembly in the normal legislative capacity were indeed sent to the Governor-General for his assent. But the constitution-making work and all concerned matters were totally kept out of the purview of the Governor-General. The constitution framed by the assembly was not submitted to the Governor-General, as required by the Indian Independence Act, 1947, not to speak of the British Queen in Parliament.

It is equally true that the Constituent Assembly of India was not elected through universal adult franchise; it was not even directly elected by the voters. Holding a direct election on the basis of universal adult franchise would require

legislation and framing of rules for election, preparation of an electoral roll, setting up elaborate machinery for British India alone. The princely states, to which election through universal adult franchise was an anathema, could not be expected even to undertake this complex exercise. The preparation for setting up such a Constituent Assembly would take anything between three and five years. The assembly could start work only after that.

Provincial legislatures had been elected in the Governors' provinces of British India in January 1946. According to different estimates 9 per cent to 11 per cent of the adult Indians had voted in those elections, as voting right was restricted by property and educational qualifications. The Chief Commissioners' provinces and the excluded areas within the Governors' provinces had no election. It was decided that these provincial legislatures would elect, on the basis of proportional representation, their representatives to the Constituent Assembly. From the princely states about half their sanctioned strength came through election from their legislatures or other electoral colleges. At the first look such an assembly would surely be regarded as elitist.

But there was a moderating force – that of the political parties – which were looking forward to a democratic India. They had the interest of the common people in their mind because they would be voters. In fact, the Constituent Assembly had made up its mind to bring universal adult franchise right at the start. Further, the Indian National Congress, which dominated the Constituent Assembly, had committed itself to a welfare ideology for the common people's interest. It gave tickets to all political groups other than the communists in the election to the Constituent Assembly. The Constituent Assembly of India, therefore, may be said to have been fairly representative of all sections of population.

None of the stable democracies in the West, beginning

with the Philadelphia Constitutional Convention of 1787, followed by the French National Assembly of 1789, on the other hand, had constituent bodies elected through universal adult franchise. On the other hand, the Frankfurt Parliament of Germany (1848), elected on the basis of universal male franchise, failed to enact a constitution. An elected Constituent Assembly has just framed a constitution in Nepal. Its durability is yet to be judged. The real test of success of a constitution is its popular acquiescence and durability. On that test the constitution of India has succeeded.

The other reason why the constitution making took such a long time was this. For nearly a century India's freedom struggle had been growing. For a vast and varied country like India it had different issues to settle, different solutions to offer and different courses to follow. The Constituent Assembly weighed the systems of government the democratic world over and reached consensus where it was possible and decisions through voting wherever necessary. But, only after elaborate discussions in the numerous committees and on the floor of the Constituent Assembly.

Changes in the situation, like the partition of British India and participation of the princely states midway in the work of the Constituent Assembly, called for successive revision of drafts. How much personal freedom should be allowed to the citizens, how much federal autonomy could be allowed to the states, what would be the role and way of selection of a Governor, and what would be the role of the judiciary were some of the issues that evoked warm, prolonged and spirited debates. The best legal brains in the country, aided by external advices, worked diligently on the task.

Nothing reflects the nature of transformation in the Indian political scene better than the objectives resolution that was moved first on 13 December 1946, in the first session of the Constituent Assembly, but finally passed on 22 January

1947, in the second session.

(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an independent sovereign republic and to draw up for her future governance a constitution; and

(2) Wherein the said territories that now comprise British India, the territories that now form the Indian states and such other parts of India as are outside British India and the states, as well as such other territories as were willing to be constituted in the independent sovereign India, would be a union of them all; and

(3) Wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the law of the constitution would possess and retain the status of autonomous units, together with residuary powers, and exercise all powers and functions of government and administration, except those vested in or assigned to the Union, or were inherent or implied in the Union; and

(4) Wherein all power and authority of independent sovereign India, its constituent parts and organs of government, would be derived from the people;

(5) Wherein shall be guaranteed and secured to all the people of India, justice, social, economic and political; equality of status, of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and

(6) Wherein adequate safeguards would be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(7) Wherein shall be maintained the integrity of the territory of the republic and its sovereign rights on land, sea, and air according to justice and the law of the civilized nations; and

(8) The ancient land attain its rightful and honoured place in the world and make its full and willing contribution to the promotion of world peace and the welfare of mankind.

It will be easily seen that the objectives resolution carried the noblest heritage of the Indian freedom movement. It was also an ambitious political statement. The Constituent Assembly set aside the cabinet mission's overall plan for a final legislation by the British parliament. It also pre-empted the proclamation of the constitution by the Governor-General.

The Constituent Assembly made two political choices in its objectives resolution that broke with the cabinet mission plan in (1) deciding to proclaim the constitution, and (2) ruling out grouping of provinces. However, it had to concede to circumstances and machinations of the empire the dream of a united India, and it abandoned the scheme of autonomous units with residuary powers.

But there is a legal paradox. In the wake of the meeting of the Constituent Assembly, Dhirendra Nath Sen asked if India was having a revolution by consent. On the other hand, W. Ivor Jannings and K.C. Wheare, British conservative constitutional experts, both disapproved of the way India made her constitution and declared herself a republic. The Indian Independence Act, 1947, according to them, did not allow it. It had not conferred sovereignty on the Constituent Assembly. They saw in the proclamation of the Indian constitution, a breach of commonwealth legality.

It can, however, be argued that the last Governor-General of India—incidentally, a veteran Congressman, C. Rajagopalachari—was a part of the entire process. On the authority of Article 393(3) of the Constitution of India that had been authenticated by the President of the Constituent Assembly, Rajendra Prasad, on 26 November 1949, the Governor-General issued The Constitution (Removal of Difficulties) Order, No. 1, on 7 January 1950, before the commencement of the constitution. *The Gazette of India Extra-ordinary* of 26 November 1949, as well as the Constituent Assembly debates of that day, reports the authentication and

the same publication on 7 January 1950 reports the issuance of the order. There is, on the other hand, no report that the Constituent Assembly proclaimed the constitution. *The Gazette of India Extra-ordinary* of 26 January 1950, rather, reports that, at 10.30 a.m. on 26 January 1950, at the Durbar Hall of the Government House, the Governor-General made the following proclamation:

> Whereas the people of India, having solemnly resolved to constitute India into a sovereign democratic republic, adopted, enacted and gave to themselves on the twenty-sixth day of November 1949, in their Constituent Assembly, the constitution of India;
>
> And whereas it has been declared by the said constitution that, India, that is, Bharat, shall be a union of states, comprising within the union the territories which were hitherto the Governor's provinces, the Indian states and the Chief Commissioners' provinces;
>
> And whereas this, the twenty-sixth day of January 1950, has been fixed for the commencement of the said constitution;
>
> Now, therefore, it is hereby proclaimed that on and from this, the twenty-sixth day of January 1950, India, that is, Bharat, shall be a sovereign democratic republic, and the union and its component units, the states, shall exercise all powers and functions of government and administration in accordance with the provisions of the said constitution.

Apparently, Jennings and Wheare were not posted with such details that imply complete concurrence of the British government with the process of transfer of power in India through the constitution. But that does not suggest that the Indian constitution evolved out of the British imperial authority or colonial practice. The character of a constitution lies not in its origin but in its function.

III

THE SPIRIT OF THE INDIAN CONSTITUTION

The Preamble

Ever since the formation of the United States of America liberal democracies in the world have put a preamble to their constitution. This is in keeping with the juristic tradition over the world according to which legislations are prefaced by a statement of its objectives primarily to guide the executive and the judiciary in the interpretation and proper application of law. A constitution being the supreme law of a country a statement of its objectives is of profound importance.

The 1936 constitution of the Union of Soviet Socialist Republics did not bear any preamble. Joseph Stalin, the main draftsman of that constitution, explained that a constitution is not a programme of the people; it is the record of their achievements. There should be nothing in a constitution that is not mandatory. The 1977 constitution of that country had an initial statement of general objectives of the constitution without using the word 'preamble'. The 1954 constitution of the People's Republic of China did not have a preamble. But the 1978 constitution of that country had a preamble.

Sir Ernest Barker, an idealist political thinker of Britain, was so impressed by the preamble to the Indian constitution that he opened his book, *Principles of Social and Political Theory*, published in 1951, the year following the proclamation of the constitution of India, with the preamble to the Indian

constitution without comment. It is in the preamble that the spirit, if not the essence, of a constitution is spelt out. It is, therefore necessary to examine the preamble to the Indian constitution to understand its spirit.

The following is the language of the preamble:

> WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC, and to secure to all its citizens:
> JUSTICE, social, economic and political;
> LIBERTY of thought, expression, belief, faith and worship;
> EQUALITY of status and of opportunity,
> And to promote among them all;
> FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Two clusters of words in this preamble are later additions. The 42nd amendment in 1976 added these two clusters—'socialist, secular,' and 'and the unity and integrity of the nation.' It should be noted that the 42nd amendment, passed by the Parliament of India during an emergency, came in for sharp criticism. Several parts of the amendment were revised after the emergency by a government that had replaced the earlier government, by the 43rd and the 44th amendments. However, these clusters of words were retained. This means that there is an acceptance of these words by all major political parties of the country. We shall discuss the implications of these words later. Before that the original preamble needs to be discussed.

Worth of the Preamble

Several judgements of the Supreme Court of India have held

that the preamble to the constitution, by itself, does not have a direct legal value. On the other hand, the preamble spells out the basic philosophy of the constitution in the light of which the articles of the constitution will have to be interpreted. The Supreme Court, however, has not pointed out the political value of the preamble. A constitution is as much a political document as it is legal. Nowhere in the constitution is this politics more manifest than in the preamble.

To begin with, the constitution of India is adopted, enacted and given to themselves by the people of India. It is not granted by a 'benevolent', native or foreign, king or dictator. This announcement distinguishes the Indian constitution from those of Britain's dominions like Canada or Australia as well as from several 'guided democracies' scattered over the third world. In spite of its indirect election, on the basis of restricted franchise, the Constituent Assembly of India could reasonably claim to represent different sections of the people, if not different economic classes.

This last shortcoming is largely remedied by the words 'equality,' 'liberty' and 'fraternity'—slogans lifted from the historic French revolution that represented the aspirations of the common people all over the world and at all times. The French revolution could not achieve them—no revolution in history has achieved them in full—but they have remained the eternal goal of humanity.

The Question of Sovereignty

The first significant word in the preamble's declaration is the sovereignty of the country marking a departure from the 'independent dominion' set up by the Indian Independence Act, 1947. It raised the status of the country to that of the free states of the West and the East. A question arose about the continued membership of sovereign India in the British Commonwealth of Nations. In a conference of the

Commonwealth Prime Ministers in 1949 the question was answered. The word British was dropped from the nomenclature of the organization and the organizational structure was modified. It was decided that a dominion could continue within the commonwealth even after declaring itself a republic. The British Queen/King (not the queen/king in Parliament) would formally remain the organization's head. The Commonwealth of Nations turned into a functional association of Britain with her former colonies on a purely voluntary basis involving no allegiance to the British crown. This voluntary character has been further underlined by occasional departures, expulsions and readmission of some member states.

It should be stressed here that membership of any regional association, like the South Asian Association for Regional Cooperation, or a functional association, like the United Nations Organization, does not affect the sovereignty of a country. Neither does any treaty, entered into voluntarily by a state, in the modern age of international cooperation. In fact, promotion of international peace and security is a directive principle of state policy in the constitution of India (Art. 51).

The Meaning of a Republican Democracy

Of profound legal-political significance is the phrase 'democratic republic'. Etymologically the two words mean *almost* the same thing, but not quite. 'Democracy' comes from the Greek word 'demos' (meaning 'power of the people'. 'Republic' comes from the Latin word '*Res Publicus*' (meaning 'of the people'). By a republic the Romans distinguished a people's state from a dynastic state (*regimen*). Today all democracies are not republics (e.g. the United Kingdom) and all republics are not democracies as will be seen in several third world countries. A democratic republic is a democracy headed by an elected official. All powers of such elected heads are derived only from the constitution. There is nothing like

an inherent power/ 'prerogative' of the head of the government.

The Indian constitution does not use the word 'prerogative.' There are, on the other hand, a set of words that are used in the constitution with reference to the powers of the executive. The word 'advice' is crucial among them. The President and the Governors act according to the advice of their respective councils of ministers. This term, adopted from the British constitutional practice, has mandatory significance. It means that the President and the Governors exercise their authority only according to the will of their councils of ministers. The next important term is 'discretion' adopted from the Government of India Act, 1935 and suggests a sphere of activity beyond the advice of the ministers. The Governors have this power; the President does not. This means that all powers of the President are actually exercised by the ministers. But the Governors, normally acting according to the advice of their ministers, may in extraordinary circumstances act without their advice. In some of the northeast Indian states this discretion is specifically sanctioned to the Governors. In some of those states, too, the governors were, subsequent to the commencement of the constitution, authorized to act in their individual judgment. That is to say, they would, in certain matters, consult their ministers but would not be bound by their opinion.

These terms are significant. In the parliamentary form of democracy that India has adopted, the council of ministers is responsible to the popularly elected legislature. To abide by their advice would mean for the chief executive bowing to the will of the people. In any case, no one has an inherent right – prerogative. Discretion in a republican democracy may only be conferred by the constitution sanctioned by the people.

The point may be illustrated by referring to four other terms: (1) pleasure, (2) recommendation, (3) consultation and (4) views. (1) The council of ministers hold office during the

pleasure of the President at the Union and of the Governors at the state levels. This term refers only to the tenure of the council of ministers. (2) Certain bills—the money bills and the bills for reorganization of states—may be moved in Parliament only on the recommendation of the President. In practice, it is the council of ministers, in the name of the President, that moves such bills. In the second place, such bills may not be moved in the legislature without the President's recommendation. This means that the executive takes responsibility for the bill and no private member of a legislature may move it. (3) The President consults senior judges of the country in the matter of appointment of the judges of the Supreme Court and state High Courts. In practice, it is the Union council of ministers which really consults the senior judges. In the second place, consultation is not taking advice; it has no binding effect. (4) Before recommending the introduction of a bill for reorganization of state the President must seek the views of the legislatures of concerned states, but (s)he is not bound by such views. Of course, in practice, it is the Union council of ministers which seeks the views of the concerned states' legislatures.

Ideologies

The ideas that are hitherto explained belong to the domain of liberal democracy. The word 'socialist' somehow goes beyond this liberal democratic framework. The word 'socialist' was first used in the Soviet Russian constitution after the Bolshevik revolution. Subsequently, the East European countries and China that passed under the control of the communist parties after World War II used it (No liberal democratic country before India put the word 'secular' in their constitution either). It will be interesting to note that, during the framing of the Indian constitution, two members of the Constituent Assembly, one belonging to the Muslim League, Syed Hasrat Mohani, and

another (Hindu) to the Congress party, Professor K.T. Shah, proposed the inclusion of the words 'secular, socialist' in the preamble. The drafting committee turned down the proposal about socialism; the reason offered being that a constitution is a political document and does not lay down any social ideology. It was silent on the question of secularism. During discussion on the right to education in the Constituent Assembly, however, Dr K.M. Munshi, a member of the drafting committee and a Congress leader involved in the States People's Movement, confessed that some princely rulers were apprehensive about the principle of secularism as their thrones were linked up with divinities and temples.

The main problem with these words is that they are subject to differing interpretations. Though the term 'socialist' was never judicially defined in India, random opinions have been thrown about as in the case of *Nakara v. the Union of India* (1983), with the Supreme Court holding that Indian socialism is a blend of Marxism and Gandhism, leaning heavily towards Gandhian socialism. Yet, the word has a global historical bearing stretching over more than a century and a half. Originally, it stood for the science of society and became the springboard of what later came to be known as sociology. Then it came to mean an economic order that was informed by a degree of equity. With Karl Marx it became a transformational ideology based on the theory of class contradiction. After his death, a moderate wing of the followers of the ideology watered down the element of contradiction and emphasized democracy and solidarity. All these trends, however, had one common article of faith: welfare of the large society preceded the interest of the individual. This welfare philosophy runs through the veins of the Indian constitution.

The specific words 'justice', 'liberty', 'equality' and 'fraternity' have been explicated in some detail. They are given shape primarily in Part III and Part IV of the constitution in

the form of fundamental rights and duties, and directive principles of state policy, respectively.

On Secularism

The term 'secularism' was coined much later. It means attachment to the secular affairs of life. It does not deny the sacred or spiritual side of human activities; it simply confines itself to the 'this worldly' business. It is not atheism. Human life mostly consists of both secular and sacred affairs. There are very few atheists in the world. Therefore, society comprises the secular as well as sacred elements. Only institutions can be secular. It is just that some institutions, like a football club or a bank, are engaged in secular activities. The state is also an institution. Those states which engage themselves in secular affairs only believe that religion is a private affair of an individual or a group of individuals and is best left to them. If a state dabbles in the religious faiths of people or is influenced by religious considerations, it splits society and invites trouble. It is quite possible for a state to have a large proportion of its population following a particular religion; it is impossible for a modern state to have a population following only one religion or belonging to one sect of a religion.

This is the reason why the United States of America, which had its origin in the settlement of religious refugees, decided to prohibit state interference in religious affairs. The very first amendment to the US constitution, enacted in 1791, ordained that the congress shall not legislate on any matter pertaining to religion. As the executive cannot spend any money without a congressional legislation, the amendment meant the prohibition of any state support to a religion. Nor could the state discriminate against a religious order. Thus, though the people of the USA are as much religious as the people of any other country are, the state does not support or discriminate against any religion by law or executive action

including financial patronage.

The constitution of India has made the difference between the sacred and the secular explicit in its body. It will be seen that Article 25, that guarantees the freedom of religion, itself contains this distinction. But, for historical reasons, strict abstention from religious affairs has not been possible for the government and the philosophy of secularism has been interpreted in a way that means equal respect for religion (*sarva dharma samabhava*). Dr S. Radhakrishnan, India's philosopher-statesman, in a 1956 lecture on *The Recovery of Faith*, presented this syncretistic view of secularism in the following words:

> When India is said to be a secular state, it does not mean that we reject the reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the state assumes divine prerogatives .... We hold that not one religion should be given preferential status .... This view of religious impartiality, or comprehension or forbearance, has a prophetic role to play within the national and international life.

In 1964, V.P. Luthera called India a 'jurisdictional state.' The state's equal patronage to all religions—particularly, in matters of pilgrimage and places of worship—has drawn some controversy. Indeed, the constitution itself has provided for grant from the consolidated fund of certain states to *devaswom* (divine property) trusts as a consequence to the merger agreement with the Travancore and Cochin states [Article 238(10)(f) in the original constitution, recast as Article 290A by the seventh amendment in 1956, following the states reorganization]. To cap the confusion, the authorized Hindi translation of the constitution has translated 'secular' as *panth nirapeksha*, which literally means independent of sects.

IV

CITIZENSHIP

The primary condition for the existence of a state is population. Not all members of a population, however, are citizens. In the eye of a state there are three kinds of persons: citizens, subjects and aliens/foreigners. Persons are entitled to their rights according to their status in a particular regime. Of course, citizenship is associated only with a republican regime. People in a monarchical system are subjects. So long as monarchy stays in Britain, the British people will, technically, remain subjects of the crown.

A citizen enjoys all the civil and political rights and performs all the civil and political duties in a state. An alien is entitled to all civil rights, but no political right; (s)he is obliged to perform all the civil duties but no political duty. A subject is entitled to all civil rights but no political right, but (s)he is obliged to perform all civil and political duties. The chief civil rights are the rights to life and liberty and the chief political rights are the right to vote and the right to criticize the government. The chief civil duties are obedience to law and payment of taxes; the chief political duties are allegiance to the state and readiness to sacrifice life in defence of the state by joining the militia during a war.

The constitution of the United States was proclaimed in the name of the 'people', the collectivity of persons. Originally, citizenship was left to the jurisdiction of the federated states alone. In the first ten amendments, creating the first set of

rights, and effected within two years of adoption of the constitution (i.e., in 1791), the 'people' alone is mentioned. It was in the 11th amendment, effected in 1798, that the citizens become the subject of rights. The Indian constitution uses three categories: person, citizen and minorities. Persons are granted right to equality before law (Article 14) whereas citizens are guaranteed against discrimination on grounds of religion, race, caste, sex, place of birth or any of them (Article 15). The language of Article 29 suggests that the minorities are used in reference to citizens (sections/groups of citizens).

Normally, citizenship of a state is determined by ordinary law of a country within the framework of the constitution, the broad division of citizens being the natural and the naturalized citizens. Among the natural citizens, again, there are two broad types: (1) *jus soli* (law of land), and (2) *jus sanguinis* (law of blood). The United States of America follows the first law; the United Kingdom follows the second. The law regarding citizenship of India had to be put in the constitution because independent India was born after partition of British India that also produced huge in-migration and out-migration of population and, in some cases, return migration. As a result, India had to combine the principles of blood and soil in the historical context.

Citizenship of India is single. Article 5 of the Indian constitution conferred citizenship on every person who, at the commencement of the constitution, had her/his domicile in the territory of India and (a) who had been born in the territory of India; or (b) either of whose parents had been born in the territory of India; or (c) who had been ordinarily resident in the territory of India for not less than five years immediately before the commencement of the constitution. By Article 6 migrants from the territory included in Pakistan were deemed to be citizens of India if they or their parents or grandparents had been born in the territory of India as defined by the

Government of India Act, 1935, (i.e. British India, the princely states of India and the tribal areas of India). Such migrants were divided into two parts: (a) those that had migrated before 19 July 1948, and (b) those that migrated on or after the date. The second class of migrants had to apply for registration to a designated officer. No one would be so registered unless they had resided in India for at least six months.

According to Article 7 those who had migrated to the territory of Pakistan after 1 March 1947 would not be entitled to Indian citizenship, but they could return under a permit for resettlement or permanent return. After that, they could be registered as citizens of India as per Article 6. According to Article 8, a person born of parents and grand parents born in India as defined by the Government of India Act, 1935, but residing abroad can be registered as citizens of India through application to India's diplomatic representation in that country. According to Article 9 citizenship of India would lapse if a person voluntarily acquired citizenship of another country.

Beyond these provisions the Citizenship Act of 1955, passed under Article 11 of the constitution, lays down detailed provisions about citizenship of India: (1) citizenship by birth for those born in India on or after 26 January 1950; (2) citizenship by descent for those born outside India after 26 January 1950 if her/his father is a citizen of India; (3) citizenship by registration for certain classes of people, not otherwise citizen, by application. Thus, persons of Indian origin who are ordinarily residents of India and have been residents of India for at least six months before making the application, and women married to Indians may be registered through application; (4) citizenship by naturalization (of foreigners) on their application on which the government is the sole decision maker; and (5) citizenship by incorporation of territory as in the cases of Goa, Pondicherry and Sikkim.

V

THE RIGHTS OF THE INDIANS

The power of a state is essentially territorial. Its jurisdiction extends beyond the boundary only by agreement with foreign states or by their sufferance. A state guarantees rights and secures obedience/allegiance by the strength of its sovereignty within its territory. They may be extended beyond a state's territory by means of agreement with foreign states or by means of force/aggression. The passport and the visa are parts of such agreement. Otherwise, citizens living or travelling abroad may claim the protection of their own state, but they may not claim it from the government of the country in which they are staying. Conversely, the power of the state to punish its citizens abroad is exercised through extradition from the citizen's country of residence at a time. The refugee/stateless person lives at the mercy of the host state.

Rights as Entitlement

The global evolution of rights is an interesting story. Rights, in the modern sense of entitlement, were not known to ancient political theory. The Greek political philosophers enquired about 'justice' from the point of view of the polity. They understood by justice something which was just—appropriate, logical. Etymologically it corresponded to 'right' that literally meant appropriate. In the Sanskrit language the word *nyaya*, which now means justice, originally meant logic.

The concept of rights, in the sense of entitlement,

emerged in the context of constitutionalist movement. The rudiments of this constitutionalism are seen in the *magna carta* (1215) in which the English king, John, agreed not to detain persons without trial. The next stage of its evolution was the rise of the concept of natural rights in the liberal political theory in the context of which a petition of rights was drawn up by the British Parliament in 1628. The climax of the movement was reached in the declaration of rights in 1689. The French revolution of 1789 issued a declaration of the rights of man.

Ever since the first ten amendments to the constitution of the United States of America in 1791 it has become a practice with the democratic constitutions of the world to incorporate rights in the written form. Yet, Article IX of the amendments to the US constitution declared that 'the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people'. Further evolution of the US citizens' rights took place through subsequent amendments (XIII in 1865, XIV in 1866, XV in 1970, XIX in 1919 and XXIV in 1962). Such rights are inviolable by the state and came to be called as fundamental rights. There may be explicit rights stated in other forms in a constitution. There may be implicit rights in the body of the constitution, treated as inviolable by the court, as the concept of natural rights. It lies with the courts to identify them. The legislature may create new rights by ordinary laws.

New concepts of human rights are emerging with the United Nations declaration of human rights and other international initiatives. They are still treated basically as moral rights. Such rights, like the rights of indigenous people, or environmental rights, become legal rights after a state undertakes them through signing covenants. Public demands and even international treaties and conventions create rights. The crucial test of their inviolability rests in their acknowledgement by courts of law in a state. The courts

acknowledge them as they are embedded, or implicit, in the constitutional and other laws of a country. All such developments, however, depend upon the political and social orders.

Differences with the US Constitution

In the rather sketchy US constitution the rights were stated in crisp, unqualified language. Whatever conditions are attached to such rights in the public interest are elaborated by the judiciary. In the large body of the Indian constitution effort was made to internalize the global as well as national experiences of about 175 years after that. Leaders of the Constituent Assembly of India, most of them senior lawyers, wanted to be comprehensive, leaving, as little as possible, for judicial determination. They had been so advised by Justice Frankfurter of the US Supreme Court with the experiences of the new deal period. Therefore, most of the fundamental rights are stated in qualified terms, like 'subject to public order' (Article 25) or 'nothing in this Article shall prevent the state from making any law' (Article 16). This does not mean that the Indian judiciary has no creative role to play in respect of fundamental rights. It is frequently required to interpret the articles on fundamental rights in the light of the qualifications attached to them.

Another difference of the Indian constitution with the US constitution is that the Indian constitution provides for not only individual rights but also sectional/group rights. The US constitution grants only individual rights. The group rights in the Indian constitution are confined to religious, cultural and educational spheres. The most important difference between the Indian and the US constitutions, however, is that, whereas the constitution makers of the USA were guided by the eighteenth century *laissez faire* doctrine, the constitution makers of India were guided by the welfare philosophy of the

twentieth century that held social control over individual rights as essential.

The Scope of State Intervention

In the first place, the fundamental rights that were asserted were not only against arbitrary state intervention; they were also against social discrimination *among* people. Thus, Article 17 abolished untouchability and made it an offence punishable in accordance with law. So was prohibited traffic in human beings and *begar* (unpaid labour) and similar forms of forced labour that were made punishable in accordance with law [Article 23 (1)]. The only comparable article in the US constitution is amendment XIII of 1 February 1865: 'Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.' It equally bound the state and the people.

In the second place, the constitution made some enabling provisions for the state authorizing it to take special measures for public purpose (as even in the old right to property), social reform (Article 25) and the welfare of the weaker sections like women and children, members of the backward classes, the scheduled castes and the scheduled tribes (Article 15) and to reserve appointments and posts in services of the state for the backward classes [Article 16(4)].

Amendments of the constitution have led to the widening of economic opportunities of the socially, economically and educationally backward classes. The 25th amendment in 1971 laid down that any law giving effect to some clauses of Article 39 (in directive principles) would not be void because of its conflict with the rights to equality, freedom and property granted in Part III. (The 44th amendment in 1978 removed property from the fundamental rights.) The 86th amendment in 2002 virtually transferred Article 45 from Part IV (directive

principles) to Part III (fundamental rights) in the form of Article 21A (free and compulsory education to children up to 14 years).

This transfer, of course, does not automatically ensure free and compulsory education to all children. Article 21A (a recent addition) says that 'The state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine.' In fact, for a long time, free primary education is being provided by the state in all parts of the country *within its capacity*. Article 21A, therefore, may be regarded simply as constitutionalization of an existing practice.

Almost an opposite trend is visible with regard to property. Originally, the constitution provided for the right to property to all citizens except for the right of the state to acquire property for public purpose (with compensation). The requirements of the land reform programme of the government led to numerous amendments of the article right from the first year of the republic until it was removed from Part III of the constitution to form a new chapter (chapter IV) of Part XII that deals with 'finance, property, contracts and suits,' by the 44th amendment in 1978. In 1981 the Supreme Court held that right to property is no more a fundamental right, but it is a constitutional right (*Bishamber v. the state of Uttar Pradesh*, 1982).

The Indian Specialities

It has been pointed out that Britain does not have a consolidated written constitution. The rights of the British people, who, technically, are subjects of the British crown, are strewn in the entire body of royal grants, parliamentary statutes and juristically determined common law. Britain's white dominions follow the same practice. During the British rule Indians did not have any fundamental rights. Rights of the

Indian subjects emanated from British statutory grants. As early as 1931, on the other hand, the Indian National Congress adopted a resolution on fundamental rights of Indians. Those principles were further developed during the next few years of freedom struggle. Naturally, the Constituent Assembly of India decided to draw up a chapter on the fundamental rights as a part of the Indian constitution.

One of the characteristics of fundamental rights in liberal constitutionalism is that they are usually described in negative ways as they are prohibitions on the states. In the socialist constitution of the USSR they were expressed in positive terms; but there was no judicial guarantee of those rights. In the absence of judicial guarantee rights become a matter of policy of the state. There was a critical debate in the Constituent Assembly of India on the way the fundamental rights should be formulated. It was acknowledged that, while some rights are negative in the sense that they are against the state and prohibitive on the state's power, some rights had to be positive in the sense that the state would have to grant them in a positive way. It was also recognized that, while the negative—prohibitive—provisions could be legally guaranteed by the courts of law, there was no way that the courts could compel the state to grant them to each and all. It was, therefore, decided that the negative rights—the 'fundamental rights proper'—would be separated from the positive rights. The negative rights were put in one part (Part III) and made judicially protected. The positive rights were put in another part (Part IV) and politically mandated. Article 37 said, 'The provisions contained in this part [Part IV] shall not be enforceable in any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.'

The Supreme Court has identified two other kinds of right

flowing from other parts of the constitution: constitutional right (*per Bishamber Singh v. the state of Uttar Pradesh*, 1982) and legal rights (*per Kuldip Nayar v. the Union of India*, 2006). Violation of those rights by the state is remedied not by resort to Article 32 but by resort to Article 226 – by approaching the High Court. Constitutional rights are created by imposition of restrictions upon the state on its claims upon the citizens. Thus, Article 265 forbids levying and collection of taxes except by authority of law. Article 300A provides that no person shall be deprived of his property save by authority of law. Article 301 provides that, subject to the other provisions of this part (of the constitution) trade, commerce and intercourse throughout the territory of India shall be free. The legal rights flow from statutes based upon the constitution but not directly from it.

Scope and Limits of Fundamental Rights

Article 13(1) of the constitution of India declares that all existing laws (on the date of commencement of the constitution), not in conformity with the fundamental rights guaranteed in Part III, would be invalid. In Clause (2) of the same article the state was forbidden to make any law taking away any of the rights in this part. In order to strengthen this two-fold prohibition the constitution created an independent right to constitutional remedies (by Article 32) through which the Supreme Court was empowered to issue writs for the enforcement of the fundamental rights. This right is available to any person. However, Article 33 gave Parliament the power to modify the application of the rights to members of the armed forces or the forces charged with the maintenance of public order, or the branches dealing with intelligence and telecommunications as they are dealing with sensitive subjects. At the same time, Parliament has power to indemnify any person in the service of the Union or of a state or any other person in respect of any act done by him in connection with

the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area (Article 34).

The concept of a martial law is associated with war of aggression or defence or an armed rebellion or military coup. It does not quite fit in a democratic constitution. Operation of martial law indicates the suspension of the entire constitution. The constitution of India takes care of such eventuality by the emergency provisions. Why, then, was it necessary to create a provision for indemnification of actions during a martial law regime? The idea emerged at a later stage of constitution making. While forwarding the revised draft constitution to the President of the Constituent Assembly in November 1949, the drafting committee wrote,

> It was pointed out to us that the fundamental rights in the constitution might prevent validation by the legislature of acts done during the period when martial law is in force and also prevent the indemnifying of persons in the service of the Union or a state in respect of action taken by them during such period. This new article [Article 34] has been suggested by us accordingly to cover this contingency.

It is but a reflection of the time when the constitution was being framed. The country was being swept by communal riots around partition and a war was going on in Jammu and Kashmir. For tackling internal disturbances there are today legislations like the Armed Forces Special Powers Act, passed in 1958 in the wake of secessionist disturbances in the Naga hills (now comprising the state of Nagaland). This controversial act has been applied several times since 1958 in several states of India. But there have not been any indemnification of excesses of the armed forces even though there could be official indulgence to them.

There are two different mechanisms of enforcement of fundamental rights: (1) the declaration by the Supreme Court of any law violating the fundamental rights as invalid—a process that is called 'judicial review', and (2) the issuance of writs against a public authority violating a person's rights. Both the remedies operate through Article 32. These provisions are equally applicable in case of the state High Courts, by virtue of Article 226 of the constitution. The difference lies in the fact that approaching the Supreme Court to seek constitutional remedies is a fundamental right of a person; approaching a High Court for the same purpose is not a fundamental right itself. It means that a High Court may decline to hear a petition seeking constitutional remedies; the Supreme Court may not decline to hear the petition.

Fundamental rights in the Indian constitution were, originally, divided under seven headings: (1) right to equality; (2) right to freedom; (3) right against exploitation; (4) right to freedom of religion; (5) cultural and educational rights; (6) right to property; and (7) right to constitutional remedies. By the 44th amendment to the constitution in 1978 the right to property was removed from Part III and constituted as Article 300A in a new chapter (chapter IV of Part XII). The sub-heading, 'right to property' has been replaced by 'saving of certain laws'. There are now six major groups of fundamental rights in India.

Right to Equality

Equality is a broad and, in some ways, contentious concept. Among the fundamental rights of the Indians, however, it holds the first place. As has been proclaimed in the preamble, right to equality is envisaged in the Indian constitution in respect of status and opportunity. Its application has, however, been subjected to several considerations, primarily circumstantial.

As the constitution is a legal document, it naturally

accords priority to equality before law. Article 14 lays down that the state shall not deny to any person equality before the law and equal protection of law within the territory of India. Equality before the law implies that no person is above the law and no person can claim a special status in law. Equal protection of law, on the other hand, means that the state shall treat equally and give equal benefits of law to all persons. It has been regarded by the Supreme Court as a basic feature of the Indian constitution.

Articles 15, 16, 17 and 18, broadly, relate to socio-economic equality. Article 15 imposes two types of prohibition. The state is prohibited from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them [Clause (1)]. No citizen can be subjected to any disability, liability, restriction or condition with regard to access to shops, public restaurant, hotels and places of public entertainment, or use of wells, tanks, bathing *ghats* (steps of rivers/lakes/ponds), roads and places of public rest maintained wholly or partly out of state funds or dedicated to the use of general public [Clause (2)]. However, nothing in this article shall prevent the state from making any special provision for women and children [Clause (3)]. By Clause(4) of the same article, added by the first amendment in 1951, further, the state was empowered to make special provision for the advancement of any socially or educationally backward classes of citizens or for scheduled castes or scheduled tribes.

Article 16 guarantees equality of opportunity for all citizens in matters relating to public employment and prohibits ineligibility of, or discrimination against, a citizen in respect of employment or office under the state on grounds only of religion, race, caste, descent, place of birth, residence or any of them. However, nothing in this article shall affect the operation of a law that provides that the incumbent of an office in connection with the affairs of any religious institution or

any member of the governing body of the institution shall be a person professing a particular religion or belonging to a particular denomination [Clause (5)]. Parliament also may make any law prescribing a requirement of residence for any class/ classes of appointments under the government of, or any local authority within, a state or Union territory [Clause (3)]. This provision came in handy after the formation of the state of Andhra Pradesh in evolving what came to be known as the *mulki* rule for solving conflicts of regional claims on the state services by the enactment of Public Employment (Requirement as to Residence) Act, 1957. The Act was subsequently applied to the then Union territories of Himachal Pradesh, Manipur and Arunachal Pradesh but was repealed in 1973 when Article 371D was incorporated by the 32nd amendment in 1973 for settling a new formula for Andhra Pradesh. Meanwhile, all the above-mentioned Union territories became states.

Article 17 abolishes untouchability, the worst social evil in India, and prohibits its practice in any form. The enforcement of any disability arising out of untouchability is punishable by law. Abolition of titles was a further step toward removal of inequality. According to Article 18, no title other than military and academic distinction shall be conferred by the state. No citizen of India shall accept any title from a foreign state. No foreigner, holding any office of profit or trust under the state, shall accept a title from a foreign state without the permission of the President of India. No person holding an office of profit or trust under the state shall accept a gift or present or emolument or office of any kind from or under a foreign state.

The Issue of Positive Discrimination

It has been noted that the objectives resolution committed the constitution makers to providing adequate safeguards to minorities, backward and tribal areas, and depressed and other

backward classes (paragraph 6). In the late British period each of these categories combined the description of socio-economic backwardness and aspiration for separate political identities. Partition of India steeled the Constituent Assembly's intention to end the concept of political minorities. Separate electorate was abolished. Attention was, however, concentrated on the removal of the objective basis of their social, educational and economic backwardness. The part on fundamental rights (Part III) put the focus on social and educational backwardness. The part on directive principles of state policy (Part IV) put the stress on economic solutions. A liberal democratic constitution cannot offer any direct guarantee in such respect. It can only offer an opportunity and remove the obstacles to their utilization. The bottom-line was drawn by the removal of negative discrimination, that is, discrimination against a person on the basis of race, religion, sex, and place of birth, or any of them by Articles 15(1), 15(2), 16(1) and 16(2).

At the same time, Articles 15 and 16 provided for positive discrimination in favour of the weaker sections of society. Clause (3) of Article 15 empowered the state to make any special provision for women and children. Clause (4) of Article 16 originally empowered the state to make provision for reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the state. Article 46, a directive principle, enjoined the state to promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, the scheduled castes and the scheduled tribes, and to protect them from social injustice and all forms of exploitation. On the other hand, Article 335 put down a subjective check on the concession while it laid down that claims of the members of the scheduled castes and the scheduled tribes shall be taken into consideration, consistently with the maintenance of efficiency

of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a state. Read along with Article 16(4), Article 335 gave the impression that reservation of posts was meant for the members of the scheduled castes and the scheduled tribes alone, although some of the southern states practised reservation for other backward classes.

The Constituent Assembly left the question of other backward classes pending until the states identified the other backward classes. The first amendment in 1951 added Clause (4) to Article 15 empowering the state to make any special provision for the advancement of 'any socially and educationally backward classes' of citizens or for the scheduled castes and the scheduled tribes.

In 1990 the issue of reservation for the other backward classes produced sharp political conflict in several northern states. The Supreme Court, in the famous Mandal case (Indra Sawhney v. Union of India) in 1992, declared that Articles 15(4) and 16(4) are different. Reservation of posts flow from Article 16(4), and not Article 15(4). This gives rise to a question. Is the need for balancing efficiency with social justice confined to members of the scheduled castes and scheduled tribes only and is not applicable to the members of the other backward classes?

The court generally stressed the need to maintain a balance between social justice and efficiency in the matter of reservation of posts for not only the scheduled castes and the scheduled tribes, but also for the other backward classes. The court also observed that the provision for reservation applies only to appointments and not promotion. The government, on the other hand, held that, in spite of the presence of reservation the share of the members of the scheduled castes and the scheduled tribes was disproportionately low.

As, in the same case, the Supreme Court laid down that

the total proportion of reservation in services may not exceed 50%, the 81st amendment in 2000 provided that the number of reserved posts lying vacant in a year could be added to the reserved posts of the succeeding year or years irrespective of 50% ceiling [Clause 4(B)]. By the 85th amendment in 2001 the provision for reservation to the benefit of the scheduled castes and the scheduled tribes was extended to the matter of promotion and seniority in such services [Clause 4(A)].

There are a few critical questions with regard to the principle of positive discrimination/affirmative action as envisaged in the Indian constitution. First, what is its status *vis-'a-vis* the general principle of equality laid down in Article 14. Second, how many kinds of such discrimination are envisaged in the constitution of India. Third, how far can the state ensure the overcoming of socio-political drawbacks of sections of the people. Article 14 precedes all other articles of the constitution in this regard. Therefore it has an overarching authority over Articles 15 and 16. Any kind of positive discrimination has to pass the test of reasonableness and conform to the limit set by such reasonableness. Thus the Supreme Court insists that the total proportion of reservation can not exceed 50 per cent of jobs available in an establishment.

But, of course, the sections of the people granted the benefits of reservation are not distributed uniformly over the country and government posts belong to both the Union and the states. Distribution of the scheduled castes and the scheduled tribes varies widely between the states. There are states in northern India where the scheduled tribes constitute insignificant minorities. Exactly opposite is the situation about the scheduled castes in the hill states of northeast India. Therefore, whereas in the Union government services 15 per cent reservation for the scheduled castes, 7.5 per cent reservation for the scheduled tribes and 27 per cent reservation

for the other backward classes reasonably corresponds to the demography of the whole country, the states may vary the proportion of the respective sections' entitlement within the 50 per cent limit.

Articles 15(4) and 16(4) relate to two different kinds of discrimination. Article 16(4) is older than Article 15(4). The former enables the government to reserve posts in the government; the latter allows other measures like grant of scholarship or reservation of seats in educational institutions for the backward classes of population. Somewhat oddly, though governments are allowed to make special provision for women and children, there is no constitutional provision for (or prohibition of) reservation of posts for women. That is a matter of administrative discretion.

There is a third area of reservation where women and the other backward classes are strong contenders. That is the field of reservation in the legislature. Article 15 cannot enable it because that reservation does not come from a government grant. It relates to the very structure of government. The constitution devotes a full part—Part XVI—to this kind of reservation. So long the constitution has provided for reservation for only the scheduled castes and the scheduled tribes, and nomination of Anglo-Indians.

A demand is growing for reservation of posts in the private sector enterprises. In spite of the government's repeated effort to persuade the private sector, no success has been achieved or foreseen in this regard. The private sector may any time down their shutters.

Right to Freedom

It is on the groundwork of equality that the right to freedom is ensured. There are two special features of the right to freedom under the Indian constitution. All the freedoms are qualified by 'reasonable restrictions' that may be imposed by law. In the

United States constitution these restrictions are determined by the courts of law. The fathers of the Indian constitution took great pain in outlining such restrictions. This, however, has not reduced the work of the Indian judiciary; for there can be endless controversy on the reasonableness of any restriction imposed by law. But this has reduced the scope for free application of restrictions by the legislature and free interpretation of such restrictions by the judiciary. Secondly, the articles on freedom have been subjected to more drastic amendment than any other article. They have, in fact, evoked the largest number of judicial disputes. They were suspended twice—during emergencies. One of the freedoms (freedom of property) has altogether been abolished.

The first article in this section (Article 19), guarantees the right (i) to freedom of speech and expression, (ii) to assemble peacefully and without arms, (iii) to form associations and unions, (iv) to move freely throughout the territory of India, (v) to reside and settle in any part of the territory of India, and (vi) to practise any profession, or to carry on any occupation, trade or business. That qualification of reasonable restriction on the rights takes the form of laws made by the state to the following effects.

The freedom of speech and expression is qualified by the interests of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency or morality or in relation of contempt of court, defamation or incitement to an offence. The right to peaceable assembly is qualified by the interests of security and integrity of India, or public order. The right to form associations and unions is qualified by the interests of sovereignty and integrity of India, or public order or morality. The rights to free movement and residence in any part of India are qualified by the general interests of the public or the protection of interests of the scheduled tribes. The right to profession, occupation,

trade or business is qualified by professional qualification needed for practicing them and the power of the state or a corporation owned or controlled by the state to the total or partial exclusion of citizens, or otherwise.

Articles 20, 21 and 22 together guarantee personal freedom of persons. Central to them, indeed central to all the fundamental rights, is the right to life and personal liberty, except according to procedure established by law, granted in a pithy language in Article 21. The judiciary has, recently, interpreted this right in a creative way. Right to life is now seen as a right to a life of dignity and fulfilment. It was in this spirit that Parliament, by the 86th amendment in 2002, added Article 21A to the constitution dictating the state to provide free and compulsory education to children between the ages of six and fourteen in such manner that the state may determine. (This mandate was earlier substantially present in the part on directive principles of state policy as Article 45. That article now stands to promise early childhood care and education to all children up to the age of six.)

Article 20 guarantees fair trial and freedom from arbitrary conviction by the state. No person can be convicted except for the violation of an offence under the law prevalent at the time of the commission of the act charged as an offence. No *ex post facto* legislation can be applied to a trial. No convicted person may be subjected to a penalty greater than prescribed by law for the offence. No accused can be compelled to be a witness against herself/himself. According to the closely related Article 22 no arrested person can be detained in custody without being informed, as soon as may be, of the ground for detention or be denied the right to consult a lawyer of her/his choice and be defended by her/him. (S)he should be presented to a court of a magistrate within 24 hours of her/his arrest, allowing for the time of transport. This protection is, however, not available to an enemy alien or a person detained under a

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law of preventive detention.

According to Clause (4) of Article 22, ordinarily, such detention may not go beyond three months. But, if an advisory board consisting of persons who are, or have been, qualified to be appointed, judges of a High Court has reported before the expiration of three months that there is in its opinion sufficient cause of such detention, the period may be extended. However, according to Clause (7) of the same article, Parliament, by law, may prescribe the circumstances under which, and the case or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an advisory board, the maximum period for which a person in any class or classes of cases under any law of preventive detention, and the procedure to be followed by the advisory board.

According to Clause (5) of the article, as soon as may be, the authorities shall inform a person under preventive detention of the ground of detention and afford her/him the earliest opportunity to make representation. But, according to Clause (6) of it, if the disclosure is thought by the authorities to be against public interest, they may not disclose the ground. Preventive detention is a controversial law prevalent since the colonial period. It enables an authority to detain a person who may not have committed an offence under a law, or may not have been suspected of having done so, but may be suspected to possibly commit an offence. Primarily, it has been applied in political cases.

Right against Exploitation

Sociologically speaking, exploitation means using someone else's weakness for one's own benefit. Its causes are embedded in socio-economic disparity in society. The Indian constitution addresses this problem, indirectly, by prohibiting discrimination and, directly, by the following articles. Article 23 prohibits

traffic in human beings and *begar* (unpaid labour) and other similar forms of forced labour, characteristic of feudalism, on pain of punishment of the offender under law. However, the state may impose compulsory service for public purposes without discrimination. According to Article 24 no child below the age of fourteen may be employed in factory, mine or hazardous occupations,

Right to Freedom of Religion

As has been pointed out, Article 25 holds the key to the freedom of religion of Indians as well as the distinction between the sacred and the secular in the life of the state. Clause (1) of this article lays down that, subject to public order, morality, and health and subject to other provisions of Part III of the constitution, all persons are equally entitled to freedom of conscience and the right to profess, practise and propagate religion. As such, the meaning of the lause is clear. There is, however, a politically charged controversy on the right to propagate religion. On the one side is the argument of freedom of thought and faith; on the other the allegation that conversion by force and inducement actually undercuts freedom of thought of the individual and social harmony.

According to Clause (2) of this article nothing in this article shall affect the operation of any existing law or prevent the state from making a law –

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of the Hindus.

There are two explanations provided in the text of this article. Explanation I says that the wearing and carrying of

kirpans (swords) shall be deemed to be included in the profession of the Sikh religion. Explanation II says that, in the sub-clause (b) of Clause (2) above, the reference to Hindus will be construed to include Sikhs, Jains and Buddhists, and the reference to Hindu religious institutions will be construed accordingly.

The two sub-clauses distinguish religion from two things, respectively. The first distinction is between the *religious* activities and the *secular* activities that include, but does not necessarily exhaust, economic, financial and political ones. This first distinction allows the state to regulate the secular affairs of large religious establishments, particularly, in respect of their finance. The second distinction, in turn, is of two kinds:

(i) that between the *religious* and the *social*. It enables the state to undertake social reform for any religious community.

(ii) that between the Hindu and other religious communities. In doing so it does intervene in the religious affairs of the Hindus, including the Sikhs, Jains and Buddhists.

This, last, intervention has to be seen in the context of the caste system that breeds untouchability and the historic temple-entry movements since the 1920s. It should also be remembered that, not only the Hindus, but also the Sikhs, the Jains and the Buddhists observe the caste system and types of untouchability. There is, however, no link between the two sub-clauses (a) and (b). Opening of Hindu religious places of public character is a religious, and not social, affair.

Barring this, last mentioned, intervention, and subject to public order, morality and health, every religious denomination or any of their sections has freedom (a) to establish and maintain institutions for religious and charitable purposes; (b) to manage its own affairs in matters of religion; (c) to own and acquire movable and immovable property; and (d) to administer such property in accordance with law.

Freedom of conscience is strengthened by two articles. Article 27 provides that no person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination. Here the state has the leeway to slip through the limit of a secular commitment. There is no bar to the state allocating funds from its general revenue to the benefit of any religion or religious denomination. Indeed, we have seen that, expenses are charged on the consolidated fund of certain southern states by the constitution towards their *devaswoms* (divine property: Article 290A).

Article 28 prohibits religious instruction in any educational institution wholly maintained by state funds unless such an institution, even though administered by the state, has been set up under any endowment or trust which requires that religious instructions be imparted in them. No person attending any educational institution recognized by the state or receiving aid out of state fund shall be required to take part in any religious instruction or religious worship in that institution without her/his or, in case of a minor, her/his guardian's consent. The *summum bonum* of this article is that the state may fund an educational institution run by a religious trust, but such institution may not compel one who does not subscribe to its faith to accept its religious instruction.

Cultural and Educational Rights

Two articles relate to cultural and educational rights. Article 29 grants any section of the citizens residing in the territory of India or any part of it, possessing a distinct language, script or culture of its own, right to conserve it. No citizen shall be denied admission into an educational institution maintained by the state or receiving aid out of state funds on the basis of religion, race, caste, language or any of them, According to

Article 30, all minorities, whether based on religion or language, have the right to establish and administer educational institutions of their choice. In making compulsory acquisition of property of a minority institution the state must pay fair compensation and ensure that their rights are not adversely affected. In granting aid to educational institutions the state shall not discriminate against any minority institution.

Read with Article 25, Article 30 would show that the minorities have a right to maintain their culture, but, not any social right as such. All communities are equally liable to social reform. The point is important in view of certain opinions that personal law of any community is beyond the jurisdiction of state law. The question is involved with that of uniform civil code, envisioned by Article 46 in Part IV (a directive principle of state policy). As that is a policy prescription, its implementation depends on political will and social circumstances. There is no constitutional limitation on the state with respect to personal law.

Property

The circumstances and the process of transformation of the right to property are an object lesson in the complexity of constitutional law. The original Article 31(1) simply asserted that no person would be deprived of his property save by authority of law. Clause (2) of the same article provided that no property could be taken possession of, or acquired. unless the law provided for compensation for it and fixed the amount of compensation or specified the principles on which the compensation was to be determined and paid. After a series of judicial cases on the adequacy of the amount of compensation, Parliament made the 4th amendment of the constitution in 1955 replacing the word 'compensation' by 'amount' and declaring that no law fixing the amount or laying down the principles for determining such amount could be called in

question on the ground that the amount so fixed or determined was not adequate. In *Vajravelu Mudaliar v. Special Deputy Collector, Madras and another* (1965), the Supreme Court accepted the amendment to the effect that equivalence (compensation) could not be questioned; but held that 'if a law lays down principles which are not relevant to the property acquired, it may be said that they are not principles contemplated by Article 31(2) of the constitution'.

The full implication of the doctrine of relevance would unfold a quarter of century later (in the *Bommai* case). Meanwhile, the 17th amendment, giving a new definition to 'estates,' was challenged in *Golak Nath v. the state of Punjab*. While agreeing with the majority view that fundamental rights are unamendable, Hidayatullah, J. opined that it was an error to put property among the fundamental rights. In 1970, in the bank nationalization case (*R.C. Cooper v. the Union of India*) the Supreme Court evoked the doctrine of relevance of the principles of determining compensation again. After the 44th amendment in 1978 property has ceased to be a fundamental right. It has become a right in chapter IV of Part XII, and it says that no person shall be deprived of his property except by law. However, certain savings of laws, erstwhile contingent upon that article (Article 31), have, somewhat oddly, been retained in Part III without an appropriate sub-title. Their proper place would be chapter IV of Part XII. Those articles are the following.

Article 31A saves laws providing for acquisition of estates; temporary management of any property by the state in public interest, amalgamation of two or more corporations either in public interest or for their proper management; extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof; or the extinguishment or modification of any rights accruing

by virtue of any agreement, lease or license for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement. These powers of the state have two provisos:

(i) Any such laws made by a state legislature shall have to secure the assent of the President of India.

(ii) If the state acquires any land under personal cultivation of a person, the compensation paid against such acquisition shall not be lower than at the market rate.

According to Article 31B a ninth schedule to the constitution was created in order to exclude certain legislations from the scope of judicial review. Originally the acts put there related to land reform. Some of the later legislations, included in the ninth schedule, related to other kinds of property too. But, when The Tamil Nadu Backward Classes, Scheduled castes and Scheduled tribes (Reservation of Seats in Educational Institutions and appointments or posts in the Services under the State) Act, 1993, was added to the schedule as entry no. 257A, the inclusion was challenged and the Supreme Court, in 2007, decided to examine the entire ninth schedule.

Article 31C had a worse fate. This article, inserted by the 25th amendment in 1971, to mitigate the effect of the Supreme Court judgement in the bank nationalization case of 1970, provided that, notwithstanding anything contained in Article 13, no law giving effect to any of the directive principles of state policy would be void and no court could call in question any such law. In the *Keshavananda Bharati* case of 1973 the Supreme Court declared void that portion of the 25th amendment that precluded judicial review of such law.

Right to Constitutional Remedies

We have already referred to the right to constitutional

remedies. According to Clause (2) of Article 32 the Supreme Court may issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. This is a very wide range of powers and, as already pointed out, is also available to the High Courts. The meanings of these technical terms are as follows:

Habeas corpus: Literally, it means to 'have the body'. Contingent upon Article 21 that guarantees the right to life and personal liberty, it is an order to any authority which has detained a person without trial to bring him to the court for trial. It challenges the executive if it has detained anyone against the authority of law. It challenges a detention order if it is *ultra vires* the statute under which the detention has been made. It can also challenge a law under which a detention has been made if that law is unconstitutional. Disobedience to this writ is met with punishment for contempt of court. This is a protection against arbitrary detention by the state without trial. It may also apply against a private person who has kept someone in wrongful detention.

Mandamus: It is an order issued to an authority or a person to do the duty mandated to it/her/him by law. It can be asked for by a person who has claim to a public or quasi-public legal duty to be performed by a person or body of persons who have refused to do their duty, an inferior court or other judicial bodies that have refused to exercise their jurisdiction, or even the government.

Prohibition: It is the opposite of *mandamus*. It prohibits a judicial or quasi-judicial body to hear a case beyond jurisdiction or assuming jurisdiction under a law which itself contravenes a constitutionally guaranteed fundamental right. It may be invoked before the completion of a trial to quash the proceedings. Prohibition is not available against purely executive acts that may be controlled by mandamus.

Certiorari: By this writ the Supreme Court, and the High

Courts, may call for the record of a case from a lower court or a semi-judicial body on an allegation of an excess of jurisdiction. It may be invoked after the completion of a trial to reverse the decision. This is, therefore, different from prohibition which is issued before the order is made, whereas a *certiorari* writ is issued after an order is made. It is also different from the appellate jurisdiction of the courts which come normally after the completion of a trial in a subordinate court.

Quo warranto: By this writ the court asks a person or body of persons under which authority it is in a public office created by the constitution or a statute. If the office is a substantive one and not dependent on the pleasure of an employer and if the constitution or a statute is violated in the matter of the appointment the court can declare it invalid. This is the most effective instrument of challenging the appointment to a public office.

By way of consolidation, Article 35 entrusts Parliament, to the exclusion of the state legislatures, with the power and the job of making laws with respect to any matters which, under certain articles, may require it do. These are: Clause (3) of Article 16 about prescription of residential qualification for employment or appointment under the Union or a state or local authority or any other authority; Clause (3) of Article 32 empowering, without prejudice to the powers conferred on the Supreme Court, any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court, to issue writs (Article 226 of the constitution itself has granted the High Courts such power); Article 33 about modification of the fundamental rights of the forces; Article 34 about restriction of these rights during martial law; and punishing the acts that are declared to be offences in this part of the constitution.

Legal Obligations of the State

But the question arises as to how much power the citizen has against the state. The Indian state is a juristic person who may acquire property, may trade, may take loan, may enter into contract, may sue, or be sued, the 'Indian state' meaning both the governments of the Union and the states. Article 300(1) lays down that the government of India may sue or be sued by the name of the Union and the government of a state may sue and be sued by the name of the state and may, subject to any provisions that may be made by acts of Parliament or state legislature enacted by virtue of powers conferred by this constitution, sue or be sued in relation to their respective affairs in the like cases as the dominion of India and the corresponding provinces or the corresponding Indian states might have sued or been sued if the constitution had not been enacted. No legislation in this regard has been made by Parliament, and the suits are being governed by the pre-independence laws.

Both the governments may sue either individuals (or bodies of individuals) and other governments. According to Article 131 inter-governmental disputes come under the original jurisdiction of the Supreme Court. Cases against individuals (or bodies of individuals) are lodged under ordinary laws and at the lowest court. The state may be sued under the ordinary laws of contract, just as any other civil case, or under the laws of tort, i.e., actionable wrong.

But here there are some exceptions. Article 361 rules out any opportunity for the citizens to sue the President, the chief executive of the Union, and the Governor, the chief executive of a state for any act done or purporting to be done while exercising their powers and performing their functions in their official capacity. No criminal proceedings whatsoever shall be instituted against them in any court during their tenure. Neither can a process of arrest or imprisonment issue against them during their term of office. Nor will any civil proceedings

claiming relief from them be instituted during their term of office in any court in respect of any act done by them in their personal capacity whether before or after entering upon office until the expiration of two months next after notice in writing has been delivered to them or left at their office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be intimated and the relief which she or he claims. These exemptions do not leave the citizens in the lurch. They may sue the government of India or a state for the official acts of the President or a Governor. They may sue the public servant who has carried out the wrong order of the President/Governor. Civil suits personally against them are not banned; they may be instituted on a notice of two months. As to the personal, allegedly criminal, acts of these office-holders the citizens must wait until they vacate their office.

The exemption on official acts comes out of the British royal privilege against any suit based on the doctrine, 'the queen can do no wrong.' That is because the queen can do nothing on her own. Every royal order bears the counter-signature of a minister signifying that the minister, on behalf of the cabinet, takes responsibility for the order, an order that does not bear the ministerial endorsement may be carried out by a government officer at her/his own risk. It will not be carried out. But that doctrine has been severely mutilated by the Crown Proceedings Act, 1947 and subsequent acts of British Parliament.

In India the President and—normally—the Governor acts according to the advice of the council of ministers. (S)he may not be held personally responsible for a government action, right or wrong, But there is a difference with the British tradition. The councils of ministers in India (at national as well as state levels) have no legal responsibility for governmental action. No court can enquire into whether any,

and if so what, advice was tendered by ministers to President [Article 74(3)], and no court can enquire into whether any, and if so what, advice was tendered by ministers to the Governor [Article 163(3)]. But an officer may be sued for acting *malafide* or in excess of authority.

As to the liability of the state, all contractual liabilities are treated in law as any private contractual liability under the law. In the cases of tort the matter is not statutorily defined. It still works on the basis of case laws emanating from the constitution and statutes. The state still claims sovereign immunity. As late as 1965, in *Kasturi Lal v. the state of U.P.* the Supreme Court upheld this immunity but restricted that to the rather indeterminate 'sovereign acts.' In 1983, in *Rudal Shah v. the state of Bihar* the court, for the first time, ordered the state to pay compensation. Since then public interest litigation under Article 32 has greatly enhanced the claim of compensation for torts.

VI

DUTIES OF THE STATE AND THE CITIZENS

One of the special features of the Indian constitution is that it contains not only positive laws but also prescription of some duties both of the state and the citizens. Part IV of the constitution lays down the directive principles of state policy which, according to Article 37, may not be enforceable by any court but are 'fundamental to the governance of the country'. It is the duty of the state to apply these principles in making laws. In Part IVA, added to the constitution by the 42nd amendment in 1976, on the other hand, a set of fundamental duties were laid down for the citizens; and the list was expanded by the eighty-sixth amendment in 2002.

Nature of the Directive Principles

B.N. Rau, constitutional advisor to the Constituent Assembly, drafted two kinds of rights: (1) those which required positive action by the state and could be guaranteed only so far as they were practicable, and (2) those which required the state to abstain from prejudicial action. He had before him the model of the Irish constitution of 1937 which had provided for fundamental rights and directive principles of social policy keeping the latter beyond the purview of the courts because of practical reasons. From this arose the so-called distinction between 'justiciable' and 'non-justiciable' rights.

In the Constituent Assembly, there were doubts as to the

efficacy of the directive principles of state policy. But the two sets of rights were adopted as a *via media* between hard-boiled legal positivism and a somewhat socialistic, if not romantic, welfare policy. Since 1951, the Supreme Court has given changing verdicts on the question if the directive principles can supersede fundamental rights, particularly because many of their commitments to people's welfare militated against the right to property. In 1970 the Supreme Court turned down the bank nationalization law on the ground of the violation of the right to property in spite of the government's plea that the law was necessary for implementation of the directive principles.

In 1971, the government moved the 25th amendment to insert Article 31C that said that 'notwithstanding anything contained in Article 13, no law giving effect to the policy of the state towards securing the principles specified in Clause (b) or Clause (c) of Article 39 shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 [equality], Article 19 [freedom, including freedom of property], or Article 31 [property]; *and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy*'. In the *Keshavananda Bharati* case of 1973, the Supreme Court declared the italicized part of the Article void as it conflicted with judicial review which the court consistently regard to be a basic feature of the constitution and, therefore, unalterable. However, the court also declared right to property as not constituting a basic feature of the constitution. The 44th amendment did away with property as a fundamental right and broadened the exception to all the directive principles. The distinction between 'justiciable' and 'non-justiciable' rights has, therefore, become immaterial. Failure to implement the directive principles has actually been a cause of several public interest litigations. Much of the judicial acceptance of their

value is, however, discretionary. The basic strength of the directive principles of state policy is political. They represent the welfare ideology and are the crucibles of the state's performance.

The Principles

In many ways the directive principles of state policy are an elaboration of the preamble to the Indian constitution. According to Article 38 the state shall strive to secure a social order for the promotion of the welfare of the people in which justice, social, economic and political, shall inform all the institutions of the national life. According to Article 39, the state shall, in particular, direct its policy towards securing –

(a) that all citizens, men and women equally, have the right to an adequate means of livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment;
(d) that there is equal pay for equal work for both men and women;
(e) that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age and strength;
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment (This last principle was added by the 42nd amendment).

The 42nd amendment also added Article 39A by which the state has been told to secure that the operation of the legal system promotes justice, on a basis of equal opportunity,

and, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

By Article 40 the state was told to take steps to organize village *panchayats* and give them enough powers to enable them to function as units of self–government.

Three articles relate to the condition of work, education and social security. Article 41 lays down that, within the limits of its economic capacity, the state should make provision for securing the right to work, to education and relief in old age, sickness and disabilities. Article 42 directs the state to secure, by legislation, humane conditions of work and maternity relief. By Article 43 the state has been told to secure, by legislation, living wage of workers, a decent standard of life and full enjoyment of leisure and social and cultural opportunities. In particular, the state shall promote cottage industries on individual or cooperative basis. By Article 43A the state has been directed to try to secure, by legislation or by any other means, the participation of workers in the management of industrial undertakings.

Article 44 directs the state to endeavour to secure a uniform civil code throughout the country. By Article 45, substituted by the 86th amendment in 2002, the state has been told to try to promote child care and early education for children up to the age of six.

Article 46 tells the state to promote with special care, the educational and economic interests of scheduled castes, scheduled tribes and other weaker sections and to protect them from social injustice and other forms of exploitation. Article 47 directs the state to try to promote the level of nutrition, standard of living and public health.

Article 48 directs the state to try to organize agriculture and animal husbandry on a scientific basis and, towards that

end, to prohibit slaughter of cow, calves and other milch and draught cattle.

By the 42nd amendment, Article 48A was added telling the state to endeavour to protect and improve the environment and safeguard forests and wild life.

According to Article 49, the protection of monuments and places and objects of national importance is the state's obligation.

Article 50 calls for effort to separate the executive and the judiciary.

According to Article 51 the state shall endeavour to

(a) promote international peace and security;
(b) maintain just and honourable relations between nations;
(c) foster respect for international law and treaty obligations in the dealings or organized people with one another; and
(d) encourage settlement of international disputes by arbitration.

Fundamental Duties of the Indian Citizens

Usually, the duties of citizens are implicit in the civil and criminal laws that the state lays down for the citizens. They were specially incorporated in the constitution of India by the 42nd amendment. The fundamental duties of the Indian citizens are listed in a pithy language in Article 51A. They are:

(a) to abide by the constitution and respect its ideals and institutions. The national flag and the national anthem;
(b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
(c) to uphold and protect the sovereignty, unity and integrity of India;
(d) to defend the country and render national service when called upon to do so;
(e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic

and regional or sectional diversities, to renounce practices derogatory to the dignity of women;

(f) to preserve and value the rich heritage of our composite culture;

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and spirit of inquiry and reform;

(i) to safeguard public property and abjure violence;

(j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;

(k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six to fourteen years.

VII

THE INDIAN UNION

A somewhat sophistic distinction is sought to be made in the legal circle between the Union of India and the Indian territory. According to Clause (1) of the first article of the constitution, India, that is Bharat, is a union of states. According to Clause (2) of the same article, the territory of India comprises (a) the territories of the states; (b) the Union territories; and (c) such other territories as may be acquired.

At the time of constitution making, this distinction made sense because the princely states were still joining the Indian union and a number of foreign colonial enclaves were scattered all over the subcontinent. Now it has become purely academic. Any state joining India is promptly assigned the status of a state or a Union territory. The Union territories are, in course of time, getting elevated to the status of states. More important, eligible residents of the acquired territories promptly become citizens of India.

The territories of the Indian Union are defined and detailed in schedule 1 to the constitution. Till the end of the year 2008 the number of states and Union territories stood at 28 and 6, respectively. They are:

States:

1. Andhra Pradesh
2. Arunachal Pradesh
3. Assam
4. Bihar
5. Chhattisgarh

6. Goa
7. Gujarat
8. Haryana
9. Himachal Pradesh
10. Jammu and Kashmir
11. Jharkhand
12. Karnataka
13. Kerala
14. Madhya Pradesh
15. Maharashtra
16. Manipur
17. Meghalaya
18. Mizoram
19. Nagaland
20. Orissa
21. Punjab
22. Rajasthan
23. Sikkim
24. Tamil Nadu
25. Tripura
26. Uttar Pradesh
27. Uttarakhand
28. West Bengal

Union territories: 1. Andaman and Nicobar Islands, The
2. Chandigarh
3. Dadra and Nagar Haveli
4. Daman and Diu
5. Delhi
6. Pondicherry

The picture was different on 26 January 1950 when the constitution was proclaimed. In the first place, the size of India's territory was smaller. The Indian republic that was inaugurated on that day comprised the Indian dominion that was created by partitioning British India on 14 August 1947, 554 princely

states that joined the Indian dominion till 26 January 1950 and the Naga tribal area that was taken over by India (and that constitutes the Tuensang district of the state of Nagaland today). Later, the French territories of Chander Nagar and Pondicherry were amicably transferred to India and the Portuguese territories of Goa, Daman and Diu, and Dadra and Nagar Haveli were acquired through popular agitation and the application of a certain amount of force. In 1974, the Himalayan kingdom of Sikkim, at India's northeast, had a democratic revolution and decided to join India. All these acquisitions were effected by the strength of Article 2 of the constitution that empowered Parliament to admit by law new states as well as Article 1(3). But for some minor border adjustments with Bhutan and Pakistan, both in the east and in the west, and occupation of a part of Kashmir by Pakistan and China, and the running border dispute with China over her northern frontier, India has not lost any territory so far.

Secondly, the internal territorial organization of the Union was not settled at the time of the proclamation of the constitution. It was obvious that autonomous existence of all the 554 princely states of varying sizes (ranging from a village to a province-sized entity) had to be rationalized. On 26 January 1950 the former British Indian provinces were intact. So were the large princely states that had joined the Indian Union—Hyderabad, Jammu and Kashmir, and Mysore. The small princely states were either merged with neighbouring provinces or grouped together to form four kinds of units of the Indian Union (Part A, Part B, Part C and Part D states). In 1956 there was a major reorganization of states leading to the formation of only two kinds of units: states and union territories. Several reorganizations involving territories and constitutional status occurred in the subsequent years. This was done by means of Article 3 of the constitution that empowered Parliament to (a) form a new state by separation

of territory from any state or by uniting two or more states or parts of states or by uniting a territory to a part of a state; (b) increase the area of any state; (c) diminish the area of any state; (d) alter the boundaries of any state; and (e) alter the name of any state; provided that a bill to effect any of these is presented to Parliament on the recommendation of the President after his taking of the view of the affected state or states.

The 1956 reorganization is somewhat mistakenly called the linguistic reorganization of India. Actually linguistic reorganization had started in 1953 with the creation of Andhra State. The States Reorganization Act, 1956, effected extensive territorial transfer, but did not create a new state. But it gave a boost to the process of formation of linguistic states. In 1960, Maharashtra and Gujarat were constituted as separate states by splitting the erstwhile state of Bombay. In 1966, Punjab and Haryana were separated and a part of the united Punjab went into the constitution of Himachal Pradesh. Before that, in 1963, started the process of the formation of what can be called 'ethnic states'. In 1963, Nagaland was carved out of the state of Assam. In 1970, an 'autonomous state' of Meghalaya was further carved out of Assam. In 1972, that autonomous state became a full-fledged state. Arunachal Pradesh and Mizoram were carved out of Assam in the same year and constituted into two Union territories, to become full-fledged states in 1987. Two more ethnic states—Chhattisgarh and Jharkhand—and a regional state—Uttarakhand—were created in 2000. The number of states also increased with the joining of Sikkim and the promotion of Union territories, or, as in the case of Goa, of a part of a Union territory, to statehood. At present demands for statehood are mainly focused on size of a state and regional imbalance.

The Federal Structure

The Indian Union is a federal union, though the word 'federation' does not occur in the body of the Indian constitution. It does not occur in the body of the United States' constitution either. The name is not important; the substance is. A federal state, as Lord Bryce put it in the nineteenth century, is a political contrivance intended to reconcile national unity and power with the maintenance of state rights.

It is necessary to resolve two theoretical confusions about federation. Text books on the Indian constitution sometimes find fault with the Indian federation as it was not born out of a treaty of sovereign states in the way the United States is supposed to have come into existence. The Indian federation, truly, evolved out of a centralized British empire. Of course, the word federation originally meant, in theological literature, a covenant/contract. But, then, the US federation was also not built by a treaty. It was the result of a revision of the confederal constitution of 1777 at the Philadelphia constitutional convention of 1787. Even the confederal constitution had been drafted centrally and enacted by the continental congress. The unity of the 13 British colonies in North America had been forged during their struggle for independence before that. William Riker, an American political scientist, writes that the treaty theory of the origin of the US constitution is fictional. In the British dominion set up, Canada offers a different example. There, the four British colonies were first united and then given a federal structure by the British North America Act, 1867.

The other confusion cropped up by a misunderstanding of the process of devolution of power from the central government to the government of the provinces that started from 1919. It was in the report of the Nehru committee of the all-parties conference that the concept of federation was floated in order to accommodate communal aspirations and princely

rights. The Simon Commission report in 1930 only adopted the term. But the Government of India Act, 1935, sought to establish a federation only *vis-'a-vis* the princely states. With regard to the provinces, there was only devolution of powers with a view to provincial autonomy. Even that was partial. The three lists of powers—central, provincial and concurrent—were not exhaustive. The residual powers were retained by the Governor-General. The princely states did not join British India and the federal scheme was a non-starter. The experience of the Indian nationalists with regard to provincial autonomy was frustrating. Negatively, however, it was educative.

A federal state is a political structure in which territorially organized units, usually called states, enjoy autonomy as a matter of constitutional right. This constitutional autonomy differs from administrative decentralization or delegation of power. A written and somewhat rigid constitution is necessary for ensuring a federal division of powers between the Union and the units. In a unitary state, the units are administrative units or local governments irrespective of the amount of functional autonomy they enjoy. By virtue of the power of judicial review, the court oversees the federal division of power outlined by the constitution. By this standard, India is a federation even if its units, called states, may not have as much autonomy as the constituent states of the USA have.

It has been mentioned above that the 'federal scheme' had been evolved in the British period as a solution to the communal problem. After the partition of India this requirement became non-obligatory. The emphasis on autonomy was reduced. Yet, there was a realization that a country of the size and diversities of India could not be democratically managed without autonomy of its units. Hence, federalism of the Indian constitution with a strong centralist bias reflecting its similarity with the Government of India Act, 1935 was adopted.

Federalism in India

Division of power between a union and its units is the guiding notion of a federation. The Indian constitution does not mention 'division'. Instead, Part XI of the constitution has the heading 'relation between the Union and the states'. Chapter I of this part has the title 'legislative relations' with a subtitle 'distribution of legislative powers'. As in a constitutional democracy government or, more precisely, the executive branch of the government, functions only on the authority of law, division/distribution of powers in a federation is, primarily, legislative. Article 73(1)(a) confirms that the Union's executive powers are co-extensive with the legislative powers plus the matters flowing from the Union government's rights, authority and jurisdiction flowing from any treaty or agreement with foreign countries. According to Article 73(1)(b), the executive power of the Union does not extend to matters in respect to which a state legislature has also power to make laws except as expressly provided in the constitution *or in any law made by Parliament*. These, italicized, words raise a problem as they may mean that, beyond the express provisions of the constitution, a law of Parliament has a scope for extending the jurisdiction of the Union executive over the autonomy of a state, which, probably, will be challenged in the Supreme Court. According to Article 162, the executive power of a state is coextensive with its legislative power. The apparent contradiction can be resolved by a reference to chapter II of this part that speaks of administrative relations between the Union and the states. The constitution does not rule out conflict, but it is fundamentally oriented toward cooperation. A strong union of strong states is the motto of the constitution.

Legislative Relations between the Union and the States

Attention is necessarily drawn to the union-state legislative relations. Article 246 of the constitution provides for this

division/distribution by creating three lists of power in the seventh schedule: List I (the Union list), List II (the state list), and List III (the concurrent list). While lists I and II are about the exclusive jurisdictions of the Union and state legislature respectively, the List III subjects may be legislated upon by the Union and the state legislatures concurrently. In the case of conflict of jurisdiction in the concurrent affairs, the Union law shall prevail. However, Article 254(2) permits a state legislature to make a law repugnant to an existing law or an earlier law of Parliament, subject to the assent of the President of India. Still, Parliament will be able to make a law on the same subject, including a law adding to, amending, varying or repealing the law so made by the legislature of a state [Article 254(2)]. In plain language, it means that the state legislatures may overstep their limit on the concurrent subjects only with the consent of the Union government; and, still, the Union legislature will have superseding power over state laws within the compass of the concurrent list.

Even within these restrictions, the state legislatures are not entirely free to legislate. Article 200 confers unlimited power on a state Governor to reserve any bill passed by the state legislature for consideration of the President. The article further directs the Governor to reserve a bill for the President's consideration if the bill, in her/his opinion, has the potentiality of so derogating from the power of the state High Court as to endanger the position which that court is designed by the constitution to fill.

Administrative/Executive Relations

Chapter II of the same part speaks of the administrative relations between the Union and the states. Although the executive power of a state is co-extensive with its legislative powers as enshrined in List II of the seventh schedule, the Union may confer additional executive responsibility on a state

after taking its consent and agreeing to bear the burden of additional expenditure. The executive power of every state has been required to be so exercised as to ensure compliance with the laws of Parliament and any existing laws which apply in that state. The executive power of the Union shall extend to the giving of such directions to a state as may appear to the government of India to be necessary for that purpose (Article 256). The executive power of a state is to be so exercised as not to impede or prejudice the exercise of executive power of the Union, and the executive power of the Union shall extend to the giving of directions to a state as may appear to the government of India to be necessary for that purpose [Article 257(1)].

A special power has been vested in the Union government to issue executive directions to states about the construction and maintenance of means of communication declared in the direction to be of national and military importance [Article 257(2)]. Still, Parliament has the power to declare highways and waterways as national highways and national waterways respectively. The Union can also construct and maintain means of communication as part of its functions with respect to naval, military and air force works. The executive power of the Union also extends to the giving of directions to a state as to measures to be taken for the protection of the railways within the state [Article 257(3)]. The Union government, however, has not been given power to construct new highways for civilian purposes; such highways have to be constructed through the states.

Thus, there is no water-tight separation between the Union and the states, far less an antagonism. If the states have a responsibility to comply with the Union government's national and defence interests, there is, also, a duty assigned to the Union by Article 355 to protect the states against external aggression and internal disturbances. Yet, possibilities

of conflict between the Union and the states are acknowledged in the original jurisdiction of the Supreme Court to try disputes between the Union and the states (Article 131), and in Article 365 that declares that,

> where any state has failed to comply with, or to give effect to any directions given in the exercise of the executive power of the Union under any of the provisions of this constitution, it shall be lawful for the President to hold that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of this constitution.

This will invite for the state Article 356 (declaration of constitutional breakdown).

Union-state Distribution of Powers

The three lists of power in the seventh schedule to the constitution have undergone a few amendments generally to the advantage of the Union. The position at present is as follows.

List I: The Union List

According to List I (the Union list) the Union has exclusive power over

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and, after its termination, of effective demobilization;
2. Naval, military and air forces, and any other armed forces of the Union;

2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any of their contingent or unit in any state in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment;

3. Delimitation of cantonment areas, local self-government in

such areas, the constitution and powers within such areas of cantonment authorities and regulation of house accommodation (including control of rents) in such areas;

4. Naval, military and air force works;
5. Arms, firearms, ammunition and explosives;
6. Atomic energy and mineral resources necessary for its production;
7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war;
8. Central Bureau of Intelligence and Investigation;
9. Preventive detention for reasons connected with defence, foreign affairs, or the security of India; persons subjected to such detention;
10. Foreign affairs; all matters which bring the Union into relation with any foreign country;
11. Diplomatic, consular and trade representation;
12. United Nations Organization;
13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat;
14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries;
15. War and peace;
16. Foreign jurisdiction;
17. Citizenship, naturalization and aliens;
18. Extradition;
19. Admission into, and emigration and expulsion from, India; passports and visas;
20. Pilgrimages to places outside India;
21. Piracies and crimes committed on the high seas or in the air, offences against the law of nations committed on land or the high seas or in the air;
22. Railways;
23. Highways declared by or under law made by Parliament to be national highways;

24. Shipping and navigation on inland waterways, declared by Parliament by law as national waterways, as regards mechanically propelled vessels; the rule of the road on such waterways;
25. Maritime shipping and navigation, including shipping and navigation on tidal waters; provision for education and training for the mercantile marine and regulation of such education and training provided by states and other agencies;
26. Lighthouses, including lightships, beacons and other provisions for the safety of ships and aircraft;
27. Ports declared by or under law made by Parliament to be major ports, including their delimitation and the constitution and powers of port authorities therein;
28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals;
29. Airways; aircraft and air navigation; provision of aerodromes; regulation and organization of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by states and other agencies;
30. Carriage of passengers and goods by railway, sea or air, or by national waterways in mechanically propelled vessels;
31. Posts and telegraphs; telephones, wireless, broadcasting and other like forms of communication;
32. Property of the Union and the revenue therefrom, but as regards property situated in a state, subject to legislation by the state, save in so far as Parliament by law otherwise provides;
33. ... omitted [moved to List III] by the 7th amendment;
34. Courts of wards for estates of rulers of Indian States;
35. Public debt of the Union;
36. Currency, coinage and legal tender; foreign exchange;
37. Foreign loans;
38. Reserve Bank of India;
39. Post office savings bank;
40. Lotteries organized by the government of India or the government of a state;

41. Trade and commerce with foreign countries; import and export across customs frontiers; definition of customs frontiers;
42. Inter-state trade and commerce;
43. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations but not including co-operative societies;
44. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one state, but not including universities;
45. Banking;
46. Bills of exchange, cheques, promissory notes and other like instruments;
47. Insurance;
48. Stock exchanges and futures markets;
49. Patents, inventions and designs; copyright; trade-marks, and merchandise marks;
50. Establishment of standards of weight and measure;
51. Establishment of standards of quality for goods to be exported out of India or transported from one state to another;
52. Industries the control of which by the Union is declared by Parliament by law to be expedient in the public interest;
53. Regulation and development of oil fields and mineral oil resources; petroleum and petroleum products; other liquids and substances declared by Parliament by law to be dangerously inflammable;
54. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in public interest;
55. Regulation of labour and safety in mines and oil fields;
56. Regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in public interest;
57. Fishing and fisheries beyond territorial waters;

58. Manufacture, supply and distribution of salt by Union agencies, regulation and control of manufacture, supply and distribution of salt by other agencies;
59. Cultivation, manufacture and sale for export of opium;
60. Sanction of cinematograph films for exhibition;
61. Industrial disputes concerning Union employees;
62. The institutions known at the commencement of the constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial, and any other institution financed by the government of India wholly or in part and declared by Parliament by law to be of national importance;
63. The institutions known at the commencement of this constitution as the Banaras Hindu University, the Aligarh Muslim University, the Delhi University, the University established in pursuance of Article 371E [i.e. the University of Hyderabad]; any other institution declared by Parliament by law to be of national importance;
64. Institutions for scientific or technical education financed by the government of India wholly or in part and declared by Parliament by law to be institutions of national importance;
65. Union agencies and institution for –
    (a) professional, vocational or technical training, including the training of police officers; or
    (b) the promotion of special studies or research; or
    (c) scientific or technical assistance in the investigation or detection of crime;
66. Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions;
67. Ancient and historical monuments and records, and archaeological sites and remains declared by or under law of Parliament to be of national importance;
68. The survey of India, the geological, botanical, zoological and anthropological surveys of India; meteorological organizations;

69. Census;
70. Union public services, all-India services, Union Public Service Commission;
71. Union pensions, that is to say, pensions payable by the government of India or out of the consolidated fund of India;
72. Election to Parliament, to the legislatures of states and to the offices of the President and the Vice-President; the Election Commission;
73. Salaries and allowances of members of Parliament, the chairman and the vice-chairman of the Council of States and Speaker and Deputy Speaker of the House of the People;
74. Powers, privileges and immunities of each House of Parliament and of the members of the committees; enforcement of attendance of persons for giving evidence or producing documents before committees of Parliament or commissions appointed by Parliament;
75. Emoluments, allowances, privileges, and in respect of leave of absence of the President and Governors; salaries and allowances of the ministers for the Union; the salaries, allowances, and rights in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General;
76. Audit of the accounts of the Union and of the states;
77. Constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such court), and the fees taken therein; persons entitled to practise before the Supreme Court;
78. Constitution and organization including vacation of the High Courts except provisions as to officers and servants of High Courts; persons entitled to practise before the High Courts;
79. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory;
80. Extension of the powers and jurisdiction of members of a police force belonging to any state to any area outside that state, but not so as to enable the police of one state to exercise powers and jurisdiction of any area outside that state without the consent of the government of the state in which such area is

situated; extension of the powers and jurisdiction of members of a police force belonging to any state to railway areas outside the state;

81. Inter-state migration; inter-state quarantine;
82. Taxes on income other than agricultural income;
83. Duties of customs including export duties;
84. Duties of excise on tobacco and other goods manufactured or produced in India except—
    (a) alcoholic liquors for human consumption,
    (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry;
85. Corporation tax;
86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on capital of companies;
87. Estate duty in respect of property other than agricultural land;
88. Duties in respect to succession to property other than agricultural land;
89. Terminal taxes on goods or passengers, carried by railway, sea or air, taxes on railway fares and freights;
90. Taxes other than stamp duties on transactions in stock exchanges and futures markets;
91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts;
92. Taxes on the sale or purchase of newspapers and on advertisements published therein;

92A. Taxes on the sale and purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-state trade or commerce;

92B. Taxes on consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-state trade or commerce;

93. Offences against laws with respect to any of the matters in this list;
94. Inquiries, surveys and statistics for the purpose of any of the matters in this list;
95. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any matters in this list, admiralty jurisdiction;
96. Fees in respect of any of the matters in this list, but not including fees taken in any court;
97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those lists.

List II: The State List

According to List II (the state list) the states have power over

1. Public order (but not including the use of any naval, military or air force or any other armed force of the Union or any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power);
2. Police (including railway and village police) subject to the provisions of entry 2A of List I);
3. Officers and servants of the High Court; procedure in rent and revenue courts, fees taken in all courts except the Supreme Court;
4. Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein, arrangements with other states for the use of prisons and other institutions;
5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration;
6. Public health and sanitation, hospitals and dispensaries;
7. Pilgrimages, other than pilgrimages to places outside India;
8. Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors;
9. Relief of the disabled and unemployed;
10. Burials and burial grounds, cremations and cremation grounds;

11. ... omitted [transferred to List III] by 42nd amendment;
12. Libraries, museums and other similar institutions controlled or financed by the state; ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance;
13. Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways, ropeways, inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles; 14. Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases;
15. Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice;
16. Pounds and prevention of cattle trespass;
17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I;
18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and collection of rents, transfer and alienation of agricultural land; land improvement and agricultural loans, colonization;

19 & 20 ... omitted [moved to List III] by the 42nd amendment;

21. Fisheries;
22. Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates;
23. Regulation of mines, mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union;
24. Industries subject to the provisions of entries 7 and 52 of List I;
25. Gas and gas works;
26. Trade and commerce within the state subject to the provisions of entry 33 of List III;

27. Production, supply and distribution of goods subject to the provisions of entry 33 of List III;
28. Markets and fairs;
29. ... omitted [moved to List I] by the 42nd amendment;
30. Money-lending and money-lenders, relief of agricultural indebtedness;
31. Inns and inn-keepers;
32. Incorporation, regulation and winding up of corporation, other than those specified in List I, and universities, unincorporated trading, literacy, scientific, religious and other societies and associations; co-operative societies;
33. Theatres and dramatic performances; cinemas subject to provisions of entry 60 in List I; sports, entertainments and amusements;
34. Betting and gambling;
35. Works, lands and buildings vested in or in possession of the state;
36. ... omitted [moved to List III] by the seventh amendment;
37. Elections to the state legislature subject to the provisions of any law made by Parliament;
38. Salaries and allowances of members of any state legislature, of the Speaker and Deputy Speaker of the legislative assembly and, if there is a legislative council, of the Chairman and the Deputy Chairman thereof;
39. Powers, privileges and immunities of the legislative assembly and of the members and the committees thereof, and, if there is a legislative council, of that council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the state legislature;
40. Salaries and allowances of the ministers for the state;
41. State public services; state Public Service Commission;
42. State pensions, that is to say, pensions payable by the state or out of the consolidated fund of the state;
43. Public debt of the state;

44. Treasure trove;
45. Land revenue, including the assessment and collection of revenue, the maintenance of records, survey for revenue purposes and records of rights, and alienation of revenues;
46. Taxes on agricultural income;
47. Duties in respect of succession to agricultural land;
48. Estate duty in respect of agricultural land;
49. Taxes on lands and buildings;
50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development;
51. Duties of excise on the following goods manufactured or produced in the state and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India: –
    (a) alcoholic liquors for human consumption;
    (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry;
52. Taxes on the entry of goods into a local area for consumption, use or sale therein;
53. Taxes on consumption or sale of electricity;
54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I;
55. Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast in radio or television;
56. Taxes on goods or passengers carried by road or on inland waterways;
57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provision of entry 35 of List III;
58. Taxes on animals and boats;
59. Tolls;
60. Taxes on professions, trades, callings and employments;

61. Capitation taxes;
62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling;
63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to stamp duty;
64. Offences against laws with respect to any of the matters in this List;
65. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list;
66. Fees in respect of any of the matters in this List, but not including fees taken in any court.

List III: The Concurrent List

According to List III (the concurrent list) the Union and the states concurrently enjoy power over

1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this constitution but excluding offences against laws with respect to any of the matters specified in List I and List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power;
2. Criminal procedure, including all matters included in the code of criminal procedure at the commencement of this constitution;
3. Preventive detention for reasons connected with the security of a state, the maintenance of public order, or the maintenance of supplies and services essential to the community;
4. Removal from one state to another state of prisoners, accused persons and persons subjected to such detention for reasons specified in entry 3 of this list;
5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this constitution subject to their personal law;

6. Transfer of property other than agricultural land; registration of deeds and documents;
7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land;
8. Actionable wrongs;
9. Bankruptcy and insolvency;
10. Trust and trustees;
11. Administrators-general and official trustees;
11A. Administration of justice, constitution and organization of all courts, except the Supreme Court and the High Courts; evidence and oaths, recognition of laws, public acts and records, and judicial proceedings;
12. Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings;
13. Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this constitution, limitation and arbitration;
14. Contempt of court, but not including contempt of the Supreme Court;
15. Vagrancy, nomadic and migratory tribes;
16. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficients;
17. Prevention of cruelty to animals;
17A. Forests;
17B. Protection of wild animals and birds;
18. Adulteration of foodstuffs and other goods;
19. Drugs and poisons, subjects to the provisions of entry 59 of List I with respect to opium;
20. Economic and social planning;
20A. Population control and family planning;
21. Commercial and industrial monopolies, combines and trusts,
22. Trade unions; industrial and labour disputes;
23. Social security and social insurance; employment and unemployment;

24. Welfare of labour including conditions of work, provident funds, employees' liability, workmen's compensation, invalidity and old age pensions and maternity benefits;
25. Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour;
26. Legal, medical and other professions;
27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the dominions of India and Pakistan;
28. Charities and charitable institutions, charitable and religious endowments and religious institutions;
29. Prevention of the extension from one state to another of infectious diseases or pests affecting men, animals and plants;
30. Vital statistics including registration of births and deaths;
31. Ports other than those declared by or under the law of Parliament or existing law to be major ports;
32. Shipping and navigation on inland waterways, as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of the List I with respect to national highways;
33. Trade and commerce in, and the production, supply and distribution of –
    (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products;
    (b) foodstuffs, including edible oilseeds and oils; (c) cattle fodder, including oilcakes and other concentrates; (d) raw cotton, whether ginned or unginned, and cotton seed; and (e) raw jute;

33A. Weights and measures except establishment of standards;
34. Price control;
35. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied;

36. factories;
37. Boilers;
38. Electricity;
39. Newspapers, books and printing presses;
40. Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance;
41. Custody management and disposal of property (including agricultural land) declared by law to be evacuee property;
42. Acquisition and requisitioning of property,
43. Recovery in a state of claims in respect of taxes and other public demands, including arrears of land revenue and sums recoverable as such arrears, arising outside that state;
44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty;
45. Inquiries and statistics for the purpose of any of the matters specified in List II or List III;
46. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list;
47. Fees in respect of any of the matters in this list, but not including fees taken in any court.

The classical concept of a federal state vested three powers in a Union government: on defence, foreign affairs and communication. The less stated, though by no means less important function of a federal union related to trade and its vital adjunct, currency. History has revealed a common tendency of all federal unions to evolve stronger economic ties dictated by the growth of commerce and industry. By the mid-twentieth century this tendency had crystallized. India's historical development easily adopted the model. But it did not stop there. A survey of the three lists will show that the super-numerary entries (the numbers followed by A and B) are additions through amendments. They are present in the Union list and, more so, in the concurrent list. These are powers transferred from the state list to which there was no

addition. Several other entries have been substantially amended to the same effect.

To put it simply, there is no addition to the state list. There have been additions to the Union and the concurrent lists by transfer from the state list. There is only one amendment—the seventh—apparently reducing the power of Parliament—deletion of 'acquisition and requisitioning of property for the purpose of the Union' (Entry 33 in List I). By the same amendment, however, it was substantially merged with the power of the states to acquire or requisition property, which was also transferred to the concurrent list as entry 42.

A second point emerges out of this phenomenon. The Union list is bigger than the state list. Along with the concurrent powers—on which the Union has a dominant share—this extensive Union list gives more power to the Union than to the states. Over and above this preponderance of the Union, Parliament has five powers that need special mention.

(1) It has the power to legislate on a subject not mentioned in any of the lists (the so-called residual powers) by virtue of entry 97 of List I.

(2) It has the power to legislate on a territory of India not included in a state even though the matter may belong to the state list. Legislation for a Union territory is under the jurisdiction of the Union legislature [Article 246, Clause (4)] though, as in the national capital territory of Delhi, power may have been transferred to a territorial legislature.

(3) If the Council of States declares by a resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in national interest that Parliament should make laws with regard to any subject mentioned in the state list specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force. Normally the maximum period of operation of the resolution is one year, but it is extendable by

another year as often as it is felt necessary by the Council of States. The operation of the law will cease six months after expiry of the resolution (Art. 249).

(4) Parliament can make law on any of the subjects in the state list during an emergency. Such law will expire six months after the termination of the emergency (Art. 250).

(5) Parliament can make law for two or more states if the legislatures of such states, by resolutions, ask Parliament to make such a law. Such laws may be repealed by Parliament but not by the concerned state legislatures (Art. 252) which can, of course, ask Parliament for repeal.

Financial Relations Between the Union and the States

Although federalism in the West was the result of union, motivated mainly by the needs of defence and financial unification, federalism in India proceeded through continuous fear of disintegration of the polity. This was mainly because of the colonial experience of a centralized government of British India passing through the trauma of partition (1947).

One of the guiding motivations behind centralization of Indian federalism was the desire for economic integration. At the time of the drafting of the Constitution there seems to have been an understanding that major industries would be in the domain of the Union – key industries, defence and the industries declared by Parliament to be of national interest, in particular being of the Union's concern. The rest of industry, and agriculture would belong to the domain of the states. Besides detailed provisions on financial-legislative powers in the seventh schedule, chapters I and II of Part XII deal with finance and borrowing systems of the Union and the state governments, respectively. Articles 268 – 81 laid down the distribution of revenues between the Union and the states. Articles 268, 269 and 270 are the most crucial to this scheme. Following the commencement of the constitution a number of constitutional amendments increased centralism, particularly

in the economic sphere, with the states complaining of financial crunch. That is to say, until the end of the last century. The 86th amendment in the year 2000 reversed the trend.

According to Article 268, such stamp duties and such duties of excise on medicinal and toilet preparations as are mentioned in the Union list are levied by the Union but collected by and assigned to the respective states. The 88th amendment added service taxes to the Union list (entry 92C) and made it to be levied by the Union and collected and appropriated by the Union and the states (Article 268A). Article 269, on taxes levied and collected by the Union but assigned to the states, however, was replaced lock, stock and barrel by the 80th amendment in 2000. A detailed, comparative estimate of the old and the new articles would not be possible in this limited space. Only a paraphrase of the original article may be compared with that of the new article under the same sub-title. The original article mentioned (a) duties in respect of succession to property other than agricultural land; (b) estate duty in respect of property other than agricultural land; (c) terminal taxes on goods or passengers carried by railway, sea or air; (d)taxes on railway fares and freights; (e) taxes other than stamp duties on transactions in stock exchanges and futures markers; (f) taxes on sale and purchase of newspapers and on advertisements published therein The new article provides that taxes on the sales and purchase of goods and taxes on the consignment of goods shall be levied and collected by the Union but shall be assigned and shall be deemed to have been assigned to the states on or after the 1st day of April 1996 and distributed among these states in accordance with such principles of distribution as may be formulated by Parliament. According to the new Article 270, all taxes and duties other than those mentioned in Articles 268, 268A and 269, and collected by the Union, are to be divided between the Union and the states. (At present the shares of the Union and the

states are at the ratio of 30:70.) Parliament, however, may increase the surcharges for the purpose of the Union and such surcharge will go to the Union. The states have gained in money.

Article 275 provides for grant-in-aid by the Union to the states that, according to Parliament, need assistance and different amounts of assistance may be allotted. Such sums are charged on the consolidated fund of India, that is, non-votable. Special stress is laid on assistance in undertaking Union-supported schemes for scheduled castes and scheduled tribes and administration of tribal areas in Assam. There is a crucial role assigned to the finance commission, appointed by the President every five years, in the recommendation of revenue shares and grants in aid. The commission also recommends measures to supplement the consolidated funds of states in order to supplement the resources of the local bodies (Article 280). The Indian finance commission has been modelled on the commonwealth grants commission of Australia, but it goes beyond the portfolio of grants. Although the grant-in-aid system is prevalent in other federations of the world, including the USA, such a regular institution is not present there. Further, statutory sharing of revenue between the Union and the units is a unique feature – a legacy of the colonial history of devolution.

Inter-state Relations

A federation is not only about Union-state relations but also about inter-state relations. While the Union is in command of the affairs concerning inter-state trade, three areas of possible dispute are inter-state boundaries, inter-state rivers and inter-state travel and trade. The way to solution to territorial disputes lies in Article 3 that empowers Parliament to alter the territorial boundaries of states. According to Article 262 Parliament, by law, may provide for the adjudication of any dispute or

complaint with respect to the use, distribution or control of the waters of, or in, any inter-state river or river valley, even to the exclusion of a role of the judiciary. Accordingly, the Inter-State Water Disputes Act was passed by Parliament enabling the Union to set up tribunals for settling such disputes.

A broad-based co-ordination among states, on the other hand, is sought to be achieved through the machinery of an inter-state council that may be set up by the President charged with the duty of (a) inquiring into and advising on disputes between states, (b) investigating and discussing subjects of common interests of some or all of the states or between the Union and one or more states; (c) making recommendations on such subjects or policies on such subjects (Article 263). Parliament also set up the National Development Council to discuss national economic plans. Following the recommendation of the Sarkaria committee on Union-state relations, a permanent inter-state council comprising six Union cabinet ministers and all state chief ministers was created in April 1990. There is no regularity of its meetings.

Union Territories

There are, as we have seen, two kinds of units of the Indian Union now: the States and Union Territories. States are those units which have distinct status in the constitution and full-fledged governments. The Union territories are administered by the Union government through administrators who, in Andaman and Nicobar Islands, Delhi and Pondicherry, are designated as Lieutenant-Governors. Their relations with the Union are not governed by Article 246 or the seventh schedule (Article 239). By the 14th amendment to the Constitution in 1962, however, Parliament was authorized to create a legislature and a council of ministers for Pondicherry (Article 239A), and, by the 69th amendment in 1991 an almost full-fledged state structure was granted to the national capital territory of Delhi

(Article 239AA). Parliament was authorized to create a legislature and a council of ministers for Pondicherry and grant the institutions powers and functions. Delhi got the structure by virtue of the constitution itself, except for powers over public order, police and land. Several Union territories have risen to the status of states. The strengths of the legislatures of Delhi and Pondicherry are determined by laws of Parliament.

Languages of the Country

The official language of the Union is Hindi written in *Devanagari* script with Indian numerals in international form. English is the alternative official language. Important regional and state languages are mentioned in the eighth schedule to the constitution. If a substantial proportion of the population of a state demand the use of their language to be recognized in the state, President may direct that such language shall also be officially recognized throughout that state or any of its part for such purposes as he may specify. The states adopt their own official languages. Hindi or English may be used for official communication between the Union and the states or between two or more states. The Official Languages Act, 1963 (amended in 1967) allowed the use of English as an alternative language indefinitely. Under this Act, government has framed rules which, among other things, require all manuals, codes and other procedural literature relating to the Union government to be prepared in both Hindi and English. All forms, headings of registers, name plates, notice boards and various items of stationery, etc. should be in both the languages. All in-service and promotional examinations and interviews in Union government ministries, departments and related offices must offer candidates the opportunity to answer in both Hindi and English. Optional use of Hindi as alternative medium in examinations conducted on regional or local basis for direct recruitment to services and posts in subordinate

offices of the Union government should be allowed.

All proceedings in the Supreme Court and in every High Court are conducted in English. Authoritative texts of all bills to be introduced or amendments thereto to be moved in Parliament or state legislatures, all Acts passed by them, and all orders, rules, regulations and bye-laws issued under the constitution or under any law made by Parliament or a state legislature shall be in English. However, the Governor, with the previous consent of President may authorize the use of Hindi or any other language in proceedings of a High Court having its principal seat in the state. Representation of persons to the Union or a state government may be made in any of the languages of the Union or the states.

An Assessment

For half a century after the commencement of the constitution states complained about their financial difficulties. The state governments run by the parties in opposition in the Union government complained about excessive interference by the governors and liberal use of the declaration of constitutional breakdown. Whereas early constitutional amendments increased structural centralism of the Indian Union, in the functional spheres, there is recently a definite trend against centralism, mainly dictated by the needs of coalitional politics. There is a noticeable reduction of declarations of constitutional breakdown. The 86th amendment has eased the financial constraints of the states. Thanks to the growth of coalition politics, with substantial role of state parties, there is a slow change in the supplicant status of the states vis 'a vis the Union. Beginning with the Kerala episode of 1959, Union-state relations have often been affected by inter-party hostility to the detriment of the federal principle of state autonomy. The climax was reached in 1977 when the Janata party government replaced the Congress government at the Union. Seven state

councils of ministers, run by the Congress party, were dismissed and fresh election called therein on the plea that Congress had lost in the sixth general elections in those states, and, therefore, their legitimacy. In 1980, when the Congress party returned to the Union government through the seventh general election, eight non-Congress state councils of ministers were dismissed on the same plea. In 1989, when the Janata Dal government was formed at the Union, several state governors were dismissed as they were appointees of the previous government. Such aberrations do happen even now-a-days; but their frequencies have diminished. Today no party can run the Union government alone. They have to depend on rather fickle coalition partners who hold sway at states.

VIII

THE UNION COVERNMENT I:
The Executive

In the Indian constitution, the state and the government are often used in identical senses, as in Article 13. At the same time, the judiciary is regarded apart from the government, as in Article 131 that confers original jurisdiction on any dispute between the governments of India and one or more states or between governments of states themselves or between the government of India and government(s) of one or more states on the one side and government(s) of one or more states on the other. In Article 32 an implicit distinction between the two is made by conferring writ-issuing powers over the governments of the Union and the states on the Supreme Court. Article 226 confers the same power on the High Courts over the government within its territorial jurisdiction. Thus the government is composed of the legislature and the executive.

In the *P.V. Narasimha Rao v. State* (CBI/SPE) case (1998), the Supreme Court of India pronounced India as a parliamentary democracy. Barring the Muslim League members, the Constituent Assembly of India had been virtually unanimous that the government of India would be parliamentary. The opposition of the Muslim League members sprang from the fear that, in a parliamentary government, Congress which, in their opinion, was a Hindu party, would have brute majority to the detriment of the religious minorities.

As to the model of the parliamentary government, there was a similar unanimity that it was British, except in two points. First, the Indian constitution would be written. That would necessarily mean that the written constitution would be the supreme law of the land and the British theory of parliamentary sovereignty will not apply in India. Second, India would be a republic. That means, primarily, that the chief executive of the Union and the head of the state is an elected President who does not enjoy the elevated status of the Queen/King in Parliament of Britain. The President of India is a part of Parliament, though (s)he is not a member of any House of Parliament. Like the queen in Britain the President of India acts according to the advice of the Union council of ministers. But, unlike the British queen, (s)he does not have any inherent power, or 'prerogative'. All the powers of the President would be derived from the constitution. There would be no power other than any that may be expressly sanctioned by the constitution.

The President

Like the queen of Britain, the President of India unites the executive and the legislature. Her/his election, at the same time, unites the Union and the states. A citizen of India, having completed the age of 35 years and qualified for election as member of the House of the People and not holding any office of profit under the government of India or of a state or any local or other authority subject to them, other than the President, the Vice-President of the Union or a Governor or a minister for the Union or a state, alone, is eligible for election as the President. If a member of Parliament or a state legislature is elected President, (s)he will be deemed to have vacated her/his seat.

The President is elected by the members of an electoral college consisting of (a) the elected members of both Houses

of Parliament and (b) the elected members of the legislative assemblies of the states and the legislature of the national capital territory of Delhi and the Union territory of Pondicherry. In order to achieve a uniformity of representation among the states *inter se* as well as between the Union and the states the following formula of counting of votes has been prescribed:

(a) every elected member of a state legislative assembly shall have as many votes as there are multiples of one thousand in the quotient obtained by dividing the population of the state by the total number of the elected members, the remainder of five hundred or more number being counted as one and added to the quotient;

(b) each elected member of either House of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the states' legislative assemblies by the total number of elected members of both the Houses of Parliament, fractions exceeding one-half being counted as one.

In this calculation of population, the figure of the last census will be referred to. The election of President is held according to the system of proportional representation by means of single transferable vote. Voting at such election is by secret ballot.

Usually a proportional representation is held on the basis of a multi-member constituency with as many votes as there are seats to be filled up. As the President's post is only one, the vote of each elector is single but transferable. Each elector has as many preferences as the number of candidates. The quota for election is 50%+1. If no candidate reaches the quota at the count of first preferences, the second preferences of the other electors are counted, and so on. The benefit of this system is that a President has an absolute majority of votes cast even by the second preference.

A President holds office for five years from the date of entering it but may continue beyond the term until the successor enters the office. (S)he may resign by writing under her/his hand to the Vice-President. A President, or a past President, has the right to seek re-election, though, except the first President, Rajendra Prasad, no one has done so. (S)he may also be removed from office by impeachment.

A President may be impeached for the violation of the constitution in two stages. An impeachment is a trial by the legislature. A charge is preferred by a resolution in any House moved after at least 14 days' notice in writing signed by not less than one-fourth of the total number of members of the House and passed by not less than two-thirds of the total number of members of the House. When a charge is so preferred, the other House shall investigate, or cause to be investigated, the charge and the President has the right to appear and to be represented in the investigation. After the investigation, if that House passes a resolution by at least two-thirds of the total number of its members declaring that the charge has been sustained, then the resolution shall have the effect of removing the President as from the date the resolution is passed.

Before entering office, the President or every person acting as President or discharging the functions of the President makes and subscribes in the presence of the Chief Justice of India or, in his absence, the senior-most judge of the Supreme Court available an oath or affirmation in the following form:

> I, A.B., do swear in the name of God/solemnly affirm that I will faithfully execute the office of President (or discharge the functions of the President) of India and will do to the best of my ability *preserve, protect and defend* the constitution and the law and that I will devote myself to the service and well-being of the people of India (emphasis added).

The significance of this oath goes beyond securing the personal loyalty of the President to the constitution. It makes her/him the protector and the defender of the constitution. We have just seen that the President may be impeached on only one ground – the violation of the constitution. This oath precedes Article 74 that binds the President to the advice of the council of ministers. This means that the President is personally responsible to preserve, protect and defend the constitution even though, due to Article 361, (s)he may not be answerable to any court for such action.

The Vice-President

There is a Vice-President of India elected by an electorate consisting of the (elected and nominated) members of both the Houses of Parliament in accordance with the system of proportional representation by means of the single transferable vote and secret ballot. To be eligible for election to this office one must be a citizen of India, having completed the age of 35, and qualified for election to the Council of States. His/her term is five years though it may continue beyond the term until a successor joins the office. (S)he may resign by writing under her/his hand to the President and may also be removed from office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of the People, the resolution having been moved after 14 days' notice. This is not an impeachment as such.

The Vice-President is the ex-officio chairman of the Council of States and holds no other office of profit. In the event of the occurrence of any vacancy in the office of President by reason of death, resignation or removal or otherwise the Vice-President acts as the President until a new President enters office upon election. If a President is unable to discharge her/his functions owing to absence, illness or any other cause, the Vice-President discharges her/his functions

until (s)he resumes office. During such acting/functioning the Vice-President will be entitled to all the powers, immunities, emoluments and allowances of the President. Otherwise, (s)he draws her/his salary as chairman of the Council of States.

In the eventuality of the unavailability of both the President and the Vice-President at office, as per an act of Parliament, the Chief Justice of the Supreme Court and, in his absence, the next senior judge of that court discharges the functions of the President. In 1969, following President Zakir Hussain's death, the Vice-President, V.V. Giri, demitted his office in order to contest the election to the presidency. Chief Justice Hidayatullah discharged the functions of the President until the election of Giri as President.

The responsibility to conduct election to the offices of President and the Vice-President is vested in the Election Commission of India (Article 324). But all doubts and disputes arising out of, or in connection with these elections, shall be enquired into and decided by the Supreme Court of India. In case the election is declared invalid, none of the actions of the President or the Vice-President committed till the date of the court decision will be void (Article 71).

The President's Powers

The President of India is the chief executive of the Union. According to Article 53, the executive power of the Union is vested in the President and is exercised by her/him either directly or through subordinate officers in accordance with the constitution. All executive action of the government of India shall be expressed to be taken in the name of the President. The President lays down rules on how her/his orders and other instruments will be authenticated. (S)he also lays down rules for the more convenient transaction of government business, and for the allocation of business among ministers (Article 77).

The supreme command of the armed forces is vested in her/him. The President has power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence—(a) in all cases where the punishment or sentence is by a court martial; (b) in all cases where the punishment or sentence is for an offence against any law relating to a matter falling under the executive jurisdiction of the Union; (c) in all cases where a death sentence is awarded. These powers of pardon may also be conferred by law on state governors and other officers.

All civil appointments in the Union government are made under the authority of the President as the chief executive and all appointments in the armed forces are made under the authority of the President as the supreme commander of the armed forces. According to Article 310, every person who is a member of a defence service or a civil service of the Union or of an all-India service or holds any post connected with defence or any post under the Union holds office during the pleasure of the President. The President has the power to appoint some constitutional officials for whose removal there are special constitutional procedures. The constitutional officials are the ministers of the Union, including the Prime Minister (Article 74), state governors (Article 155), judges of the Supreme Court of India and the state High Courts [Article 124 (2)], the Attorney-General of India (Article 76), the Comptroller and Auditor-General of India (Article 148); members of the Election Commission (Article 324) and the members of the Union Public Service Commission [Article 316(1)]

The Attorney-General of India and the governors of states hold office during the pleasure of the President. But, for the removal of the other constitutional office holders the following procedure is laid down. Each House of Parliament has to make an address by a majority of its total membership of, and a

majority of not less than two-thirds of the members present and voting in each House in the same session, asking for their removal on the ground of proven misbehaviour or incapacity. This procedure, informally, is called impeachment. But there are some fine technical differences. There is the requirement of 14 days' notice in the impeachment of a President which is absent in the other cases. The House, to which the charge against a President is preferred, has to conduct an enquiry into the charge and the President is allowed a hearing as well as legal representation. In the other cases these steps are not required.

It is necessary to note that the Indian constitution formally recognizes the President as the chief executive not as 'the head of the state', although all the powers traditionally belonging to a head of the state, including that of appointment of diplomatic representatives of India, are vested in her/him. In fact, the concept of the head of the state is a vestige of monarchy. It does not exist even in the constitution of the USA except for ceremonial purposes.

The Legislative Powers of the President

The President is a part of Parliament but not a member of any of its Houses. Her/his legislative powers begin with the power to finally decide on a question of disqualification of a member of Parliament (Article 103). According to Clause (2) of the same article, however, before giving the decision President shall take the opinion of the Election Commission and 'shall act according to such opinion'. Here a problem arises: Does the Election Commission advise the President in council or just *the* President? Does the President, in this matter, go by the advice of the council of ministers or the Election Commission? What happens if the council of ministers advises the President contrary to the opinion of the Election Commission? One solution to the paradox may be to bind the advice of the council

of ministers to the opinion of the Election Commission. That is to say, the council of ministers should be bound to advise President in accord with the opinion of the Election Commission. The problem with this solution is that, according to Article 74(2), no court can inquire which advice, if any, was tendered by the council of ministers to the President. The question is critical because, sometimes, the fate of a council of ministers itself may hinge on the disqualification of one or a few members and the advice of the council of ministers may suffer from a conflict of interest. Fortunately, in India, the Election Commission has earned a moral stature that compels a government to respect it. But the negative possibility remains.

Routine legislative powers of the President encompass a set of activities beginning with the summoning of the Houses of Parliament and proroguing them. They may be said to be ending with the dissolution of the House of the People. (S)he has a right to address either House of Parliament or both the Houses assembled together and require the attendance of the members for the purpose. (S)he can send messages to any House of Parliament on a pending bill or any other matter. At the commencement of the first session after each general election to the House of the People and at the commencement of the first session of each year, (s)he addresses the joint sessions of the two Houses to inform Parliament of the causes of its summons. Whenever there is a disagreement between the two Houses, (s)he causes a joint sitting of the two Houses (Article 108) but does not address it. No money bill may be moved in the House of the People without the prior sanction of the President because, as the head of the executive, (s)he alone knows what amount of money to be demanded of the legislature and (s)he alone may decide how to collect it. According to Article 111, the President's assent is necessary for all bills passed by the two Houses of the Union legislature to become Acts. However, if the President withholds her/his

assent from a non-money bill, (s)he may return the bill, 'as soon as possible' to the legislature with suggestions for amendment, if any, for reconsideration. The Houses must do it. If they send the bill again, with or without the amendments suggested, President has to give her/his assent. However, there is no limit to the time between receiving a bill and returning it to the legislature. Effectively, this may kill a bill.

There is no definite dictate of the constitution that President cannot absolutely withhold her/his assent to a money bill or a non-money bill. But there are some practical limitations to the use of such an absolute veto. In the first place, President has consented to the introduction of all money bills. Further, as we shall see in the next chapter, no money bill can be amended from the floor of the House. A money bill, on rare occasions, may be amended if the executive accepts such amendment. Even a private member's bill may be passed only with the executive's support. Therefore, President has no alternative to signing a bill on the advice of the council of ministers. There is only one possibility of a bill, passed by the legislature, being vetoed. If the council of ministers changes during the pendency of the bill with the President, the new council may advise the President to veto a bill.

When Parliament is not in session, if President considers it necessary, (s)he may promulgate ordinances that will have the force of parliamentary acts. Ordinances are temporary laws made by the executive. In the past members of Parliament have protested against issuance of ordinances shortly before the commencement of sessions of Parliament. They are alleged to have been used to pre-empt legislative deliberations by delivering *fait accompli*. This power does not belong to the British crown, but it was granted to the governors and Governor-General in colonial India. In the bank nationalization case (*Cooper v. the Union of India*) in 1970, the Supreme Court noted the possibility of prorogation of the

House with a view to passing an ordinance after that. The silver lining is that such ordinances will be placed in both the Houses of Parliament and will lapse after six weeks, or earlier if they are disapproved of. They may be withdrawn before that period too. If the two Houses are summoned on different dates, the six weeks will be counted from the later of these dates.

The other silver lining is that no appropriation of money from the consolidated fund of the Union or a state is possible by ordinances. Ordinances are, in any case, best resorted to at minimum frequency.

The President also has certain emergency powers about which we discuss separately in chapter XIV.

The Council of Ministers

According to Article 74(1), there shall be a council of ministers, headed by a Prime Minister, to aid and advise the President. As the word 'shall' in the constitution means must, this clause means that there must always be a council of ministers around the President. There can never be a President's rule at the Union level. According to Article 75, the Prime Minister is appointed by the President and the other ministers are appointed by the President on the advice of the Prime Minister. Ministers are members of any of the two Houses of Parliament or have to be one within six months of becoming ministers. Otherwise, they lose their jobs. The nominated members in either House are not usually appointed ministers though there is no constitutional bar to it. By the 91st amendment in 2003, the maximum strength of the council of ministers was fixed at one-fifth of the strength of the House of the People. Ministers may attend either House of Parliament and address it but may not vote in the House of which they are not members.

The ministers, including the Prime Minister, are administered two oaths by the President: (1) an oath of office and (2) an oath of secrecy, both laid down in schedule three of

the constitution. The oath of office is –

> I, A.B. swear in the name of God/solemnly affirm that I will *bear true faith and allegiance* to the constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and consciously discharge my duties as a minister for the Union and that I will *do right* to all manner of people in accordance with the constitution and the law, without fear or favour, affection or ill-will (emphasis added).

The oath of secrecy is –

> I, A.B., swear in the name of God/solemnly affirm that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a minister for the Union except as may be required for the due discharge of my duties as such minister.

Emphasis has been added to certain words in the oaths of office of the President and the ministers for the Union to underline the point that, whereas the President is oath-bound to 'protect, preserve and defend' the constitution, the ministers are oath bound to 'bear true faith and allegiance' to the constitution and to 'do right' to all manner of people. It is within the boundaries of these oaths that the relation between the President and the Union ministers has to be understood. A further point of consideration is that the President does not take any oath of secrecy presumably because the President is not privy to the information available to the council of ministers

Connected with this responsibility to the constitution are the Prime Minister's duties (a) to communicate to the President all decisions of the council of ministers relating to administration of the affairs of the Union and proposals for legislation; (b) to furnish such information relating to the

administration of the affairs of the Union and proposals for legislation as the President may call for; and (c) if the President so requires, to submit for the consideration of the council of ministers any matter on which a decision has been taken by a minister but which has not been considered by the council (Article 78). Along with the proviso to Article 74(1) this article is a moderating instrument against any ministerial haste and indiscretion, individually as well as collectively. But it creates a problem.

Are the ministers, committed to the oath of secrecy, bound to communicate to the President such information which they consider sensitive and not to be made public? As President is not bound by the oath of secrecy, passing of such information to the President may make it publicized. At the height of tension between President Zail Singh and Prime Minister, Rajiv Gandhi, the latter declined to communicate certain information to the former. The President could not secure it. However, if the President suspects that something is transpiring at the level of the council of ministers that threatens the constitutional edifice, (s)he may insist on relevant information and, if the council of ministers declines to furnish it, the President will have the right to dismiss it at her/his own responsibility.

The Parliamentary System

The ministerial system in India is also known as a parliamentary and a cabinet system. Parliamentary system signifies the responsibility of the council of ministers to Parliament. The cabinet system refers to the historical model of British constitutional evolution in which a cabal developed, in the late 17th century, within the Privy Council to almost exclusively advise the monarch. Eventually, when this cabal developed responsibility to the parliament, the parliamentary system evolved. Members of the British cabinet are ministers,

sometimes called secretaries. But there are ministers outside the cabinet too, who are not privy councilors. Until the 44th amendment to the Indian constitution the word 'cabinet' was absent in it. However, the council of ministers always was stratified into three ranks by the rules of government business: cabinet ministers, ministers of state and deputy ministers. The 44th amendment inducted this word into the body of the constitution [Article 352(3)] and also defined it as comprising the Prime Minister and other ministers of cabinet rank appointed under Article 75. The cabinet, therefore, may be treated as a committee within the council of ministers. Within the cabinet, committees have been set up, like the cabinet committee on political affairs, the cabinet committee on economic affairs and the cabinet committee on defence, in which ministers below the cabinet rank are sometimes included.

Ministries, including the secretaries, are supposed, principally, to be parts of the government. Under them are the departments which actually run the administration. Which department will be under which ministry depends on the rules of business issued by the President but actually framed by the Prime Minister. The placements have to be rational as a whole. But personal, factional and coalitional considerations often influence such decisions. There are, for example, ministers of states with independent charge of departments. The earlier practice of appointing parliamentary secretaries with ministerial status was the product of such contingencies.

Ministers should be members of either House of Parliament at the time of assuming office or within six months of it. There is no constitutional bar to the reappointment of a minister, who has failed to come to any of the Houses, after a day's gap. But that is considered bad practice. An easier way is to get such a minister elected to the Council of States from a state where her/his party has legislative majority. Each ministry

has a secretariat composed of civil servants who are expected to be politically neutral so that they may serve governments run by alternating parties without fear or favour. The cabinet has its own secretariat, headed by the cabinet secretary, enjoying the status of the topmost civil servant of the country. Prime Minister Jawaharlal Nehru always kept the Ministry of External Affairs. So he ran his prime ministerial office from the south bloc of the central secretariat. As the vice-president of the interim government before Independence, he had a private secretary. By 1954, his secretariat had a principal private secretary and three assistant private secretaries. The demarcation between the Prime Minister's secretariat and the cabinet secretariat was not always clear and Dharma Vira, an ICS officer, served as both the cabinet secretary and the Prime Minister's secretary. Lal Bahadur Shastri, his successor, on the other hand, did not hold any particular ministry. So he set up a small Prime Minister's Office (PMO) for himself. Indira Gandhi greatly strengthened the PMO.

The President and the Council of Ministers

In Britain, whose ministerial system has been taken as a model by India, government is run chiefly by conventions that have turned the queen into a nominal executive and the council of ministers the real executive. Before 1937 ministers were not even known to British law. The constitution-makers of India chose to write out the provision for ministers only partly, and left the actual working of the system to conventions. Article 74 (1) simply provided that 'there shall be a council of ministers to aid and advise the President in the exercise of his functions'. The pre-eminence of conventions was upheld by Article 74(2) which said that the question whether any, and if so what, advice was tendered by the ministers to the President shall not be inquired into in any court. It was understood as a matter of convention that the President, in all her/his functions, would

be guided by the advice tendered by the council of ministers alone. It was stressed in numerous statements in the Constituent Assembly of India, including those by B.R. Ambedkar, chairman of the drafting committee, Jawaharlal Nehru, Vallabh Bhai Patel and the chairman of the Constituent Assembly, Rajendra Prasad, that the advice of the council of ministers, conveyed by the Prime Minister, would be binding on the President. In the *Shamser Singh v. the state of Punjab* case in 1974 the Supreme Court accepted this position unequivocally. That made all the powers of the President, except the power to appoint the Prime Minister, actually vested in the Prime Minister and his colleagues. It was also realized that a council of ministers could always force the hands of the President by the threat of resignation.

By the 42nd amendment, much of it was formalized. It was laid down by a proviso added to Article 74(1) that the President can ask the council of ministers to reconsider an advice but once, and the President has to act according to the advice submitted after reconsideration. As has been said above, there is no limit to the amount of time that the President may take to send back an advice and to accept the advice, a phenomenon known as 'the pocket veto'. It may effectively kill an advice as, during the time of such transaction, (1) the utility of the advice may lapse, (2) the council of ministers may be compelled to resign, and (3) President may dismiss the council.

The crucial question, therefore, is two-fold: How does the President appoint a Prime Minister? And how can (s)he get rid of a Prime Minister?

There is only an indirect guidance of the constitution. The ministers, according to Clause (2) of Article 75, hold office during the pleasure of the President. According to Clause (3) of the same article the council of ministers is collectively responsible to the House of the People. The apparent

incoherence of the two clauses cannot be resolved by stressing the individual accountability of the ministers to the President and their collective responsibility to the House of the People. For the appointment of the ministers is at the advice of the Prime Minister and the removal of a minister through the withdrawal of the President's pleasure will certainly create problems for the Prime Minister and her/his colleagues because of the party ties. It may, of course, be argued that the President may, individually, dismiss *all* the ministers from office. But that would amount to dismissal of the entire council of ministers which may still be enjoying the confidence of the House of the People.

In such a case the President shall be obliged to find an immediate replacement. Given the configuration of the parties in the House of the People, that will be an impossible task. On her/his own, the President may not dissolve the House of the People. (S)he will have to find a puppet Prime Minister who, without establishing her/his majority support in the House, may advise the President to dissolve it. In that case the puppet Prime Minister takes the responsibility for dissolution. Unless a miracle happens, in the next general election, the puppet Prime Minister will cut a sorry figure and expose the President to the possibility of ridicule, if not impeachment.

Finally, it is impossible for a President to get rid of an individual minister without the consent of the Prime Minister. That will damage the unity of the council of ministers and the council is expected to solidly back that colleague. That may foment rebellion and endanger the position of the Prime Minister in her/his party or coalition. In a single party government ministers usually represent factions; in a coalition government they usually represent parties. This, however, does not make individual ministers irresponsible. They are always liable to answer questions in Parliament. The committee on public accounts may any time put them into trouble. The

recent Right to Information Act has made them vulnerable to public gaze. Investigative journalism holds a permanent test to their efficiency and integrity. They have to be assets rather than liabilities for their party and the Prime Minister in the next election. Provided the party is with her/him, a Prime Minister may get rid of a minister. (S)he may request a colleague to resign. In case the colleague does not comply. (s)he can advise the President to dismiss her/him. Of course it is possible for a Prime Minister, enjoying party support, to get rid of inconvenient party colleagues in the way that Jawaharlal Nehru removed Morarji Desai and S.K. Patil in 1963. At least one minister was dropped by a Prime Minister on the insistence of the President. At the height of the tension over the postal bill K.K. Tiwari had to be dropped by Rajiv Gandhi on demand of President Zail Singh for launching a scathing personal attack on the latter.

In Britain the entire system of cabinet government is based on conventions of which the party system is the most important. It has given the council of ministers the pillars of unity, Prime Minister's leadership, solidarity and collective responsibility. These pillars are present in the ministerial system of the Indian government too, except for the fact that the 52nd amendment of the Indian constitution in 1985 made the party system constitutional.

Ministerial Responsibility

Before we discuss the full implications of ministerial responsibility it is necessary to clarify a confusion of terminology. There is a difference between accountability and responsibility. Accountability is an obligation to answer to the employer for any lapse in duty; its failure calls for dismissal or other forms of punishment from her/him. Responsibility is an obligation to fulfill the demands of those one claims to represent and on behalf of whom one enjoys position and

power. Failure to fulfill that responsibility calls for resignation. Failure to resign in such a case may lead to dismissal only indirectly. People whom the responsible person represents, in this case, the party or the group of parties in the legislature, may approach the President to convey their lack of confidence in the Prime Minister and her/his colleagues. In such a case, it will be appropriate for the President to dismiss her/him. Ministerial responsibility is the restraint on unbridled power of the ministers in a parliamentary form of government because there is no separation of powers in it in the way it exists in a presidential government like the USA.

Ministerial responsibility is a resource too. It is the stock in trade of the ministers against the President's pressures and displeasure. It always reminds the President of the legislature's support behind the ministers and pulls her/him back from the precipice of governmental dismissal. Of course, the legislative support means the support of the majority party, or the majority alliance within the legislature, particularly within the House of the People. A council of ministers convinced of its majority may even threaten resignation that may confront the President with the unenviable task of finding an alternative council with a reasonable chance of survival.

The majority phenomenon regulates the entire system of ministerial government. As to the appointment of ministers, no President wants an unstable government as no one wants frequent elections. While making the appointment of ministers, therefore, a President gauges the possibility of every contender for the Prime Minister's post to provide a stable government. If an election throws up a party with clear majority in the House of the People, the President's task is easy. The majority party chooses its leader and conveys the choice to the President who, then, calls the leader to form the government. If there is no clear majority for a party, the President enters into negotiation with parties. The largest party, of its own, may

stake its claim to government formation. Otherwise, the President calls the leader of the largest party to ask if (s)he is capable of forging a stable majority alliance and willing to form a government. In case the leader of the largest party declines, as Rajiv Gandhi did in1989, the leader of the next largest party is summoned. The exercise will go on until a workable arrangement is arrived at.

The appointment of the Prime Minister is the most important real power of the President. It is a worrisome responsibility too. In the current days of hung legislatures coalitions lay claim to government. A President has to decide whether (s)he should call the leader of the largest party or the leader of the largest coalition. Today the parties have a constitutional status. It is easier to keep a party together than a coalition. A Prime Minister is the archetypical leader of a council of ministers. On her/his choice the stability and efficiency depends. A President may easily be accused of bias and manipulation in this choice particularly because most of the Presidents of India have themselves been politicians.

Therefore, the Presidents have developed the practice of asking someone entrusted by her/him with the job of forming a government, without a clear majority, to prove her/his majority in the House of the People within a minimum time by seeking what came to be known as a 'vote of confidence'. This is not, strictly, necessary. If the opposition doubts the majority of a government, it may move a motion of no confidence immediately after the House assembles. The House of the People has developed a convention to accord priority to a motion of no confidence because, if a council of ministers is defeated after a time of being in the government, its actions before that are liable to be considered illegitimate. But, then, the opposition may suspect manipulation and underhand dealings by the Prime Minister, probably in league with the President, to 'buy' the support of the legislators. The point is

raised because there is an opinion in the country that affairs of the legislature should be best left to them without outside interference. A mid-way solution is this. The President, while appointing a Prime Minister with doubtful strength, should obtain from her/him a commitment to meeting the legislature within a specifically limited time and leave the rest to the legislators themselves. If a no-confidence motion is moved and passed in the House, it will be obligatory for the council of ministers to resign. If it does not resign after the defeat, the President will be obliged to withdraw her/his pleasure from the council of ministers and sack it. The President may also withdraw her/his pleasure from a council of ministers if it does not face the House within the stipulated time.

The Question of Confidence

A confidence motion is a somewhat anomalous phenomenon in the legislative process. It evolved in 1971 in the wake of several controversies over government formation in the states following the loss of Congress majority in the 1967 state assembly elections and resulting in rampant defections and gubernatorial manipulations. A conference of state governors recommended this measure in a state where no political party had clear legislative majority to form government on its own strength. For a long time, the Union government was immune to this problem and, in 1977, when the Congress lost majority in the House of the People, it was not invoked because the Janata Party had a clear majority. It was the Charan Singh government, which had been formed after a split in the Janata Party in 1979, which was first told to seek the confidence of the House of the People. He resigned before facing the House. Ten years later the Janata Dal government under V.P. Singh's leadership sought the first vote of confidence in 1989, successfully. The Janata Party government in 1977, the second National Democratic Alliance (NDA) of 1999 and United

Progressive Alliance (UPA) government of 2004 did not have to prove their initial majority by way of what came to be known as 'seeking confidence'.

Once a council of ministers establishes its majority in the House of the People, the confidence should be assumed to remain with them until proved otherwise. That is to say, confidence or its lack should be treated as the mutual affair between the council of ministers and the House. The vicissitudes of parties are no concern of the President as long as (s)he does not suspect that the council of ministers is unwilling to face the legislature. Even then, the council of ministers is entitled to demand the reprieve of six months allowed by Article 85 of the constitution between two sessions. President may pressure the council to call an earlier session; (s)he need not take the extreme step of dismissal unless, of course, (s)he is convinced that the council of ministers may cause serious mischief interim. There is a critical judgment involved and the President has a great responsibility.

This brings one to the question of resignation/dismissal of a council of ministers. A council of ministers may be defeated on a major bill in the House of the People, defeat on minor bills being ignored. It may be delivered a clear vote of no confidence. In both these cases, the council should resign, or the President may dismiss it. However, as in England, a defeated council of ministers may choose to face the electorate as an appeal against the legislative vote and seek dissolution of the House with a view to a general election. Should the President accept the advice or, instead of dissolving the House, dismiss the council of ministers? The answer is not clear. In over a hundred years no queen or king in England has declined dissolution for, in that case, (s)he may be embroiled in inter-party politics. W. Ivor Jennings, however, held that, if the monarch seriously doubts the *bona fides* of the advice, (s)he may decline the request for dissolution. It is, at the same time,

possible that a council of ministers, without ever establishing it majority in the House, advises dissolution after defeat or in anticipation of defeat. In that case, the President is not bound to accept the advice. On the other hand, the convention has been firmly established in Britain that without a cabinet advice the Crown cannot dissolve the House of Commons.

A council of ministers that has lost majority and has submitted resignation is called upon to carry on with the routine work on government and not to take any important decision without, at least, consulting the opposition parties. This principle has led to the concept of a caretaker government. In no case, however, should a Prime Minister submit resignation and, simultaneously, advise dissolution of the House of Commons. That advice carries no authority of responsibility. A council of ministers may either resign *or* advise dissolution. Neither should the President accept a combined advice, for acceptance of such advice will be at the President's responsibility. On the other hand, a council of ministers against which no vote of no-confidence has been passed, has every right to advise dissolution, and the President is obliged to accept it, with the option of returning the advice once for reconsideration of the council.

The President and the Prime Minister

In the past the relation of the President and the Prime Minister has sometimes been problematic. There were reports of occasional but serious ideological differences between Rajendra Prasad, the first President, and Jawaharlal Nehru, the first Prime Minister, both stalwarts in the same ruling party, the Congress. It has been reported that Nehru turned down Rajendra Prasad's desire to personally address Parliament on the Hindu Code Bill. While laying the foundation stone of the Indian Law Institute at New Delhi, in 1960, Prasad caused a flutter by asking the constitutional experts to re-examine the

powers of the President in the Indian constitution. Rumours arose in the 1960s of Nehru's difference even with the philosopher President, S. Radhakrishnan. It is believed that the restriction of the President's power to return a cabinet advice once imposed by the 42nd amendment, was due to the reluctance of President Fakhruddin Ali Ahmed to sign the proclamation of the 1975 emergency on the advice of Indira Gandhi conveyed by a cabinet minister. In 1987, the difference between President Zail Singh and the Prime Minister, Rajiv Gandhi, came out in the open when the former returned the Indian Post Office (Amendment) Bill against the Prime Minister's advice. This was the first time since Independence that a President *really* returned a bill. President A.P.J. Abdul Kalam, a natural scientist, did the same later. Except the 1987 incident, however, none precipitated a major constitutional crisis at the Union level.

It is in the legislative field that the difference between the President and the Prime Minister is likely to be exposed most because (1) the President is a part of Parliament though not a member of a House and (s)he has a constitutional access to the members by means of her/his message; (2) Parliament is the most effective body, next to the council of ministers, and has the highest communicating ability; and (3) there is a structural anomaly caused by the 42nd amendment.

Right from the beginning, the President had the power to once return a bill to the legislature, with suggestions for amendment, for reconsideration. Until the 42nd amendment, ministerial advice was conventionally binding on the President. But the convention was powerful and no President violated it. Therefore, the President could return a bill for reconsideration of the legislature on the advice of the council of ministers only. That was a virtual impossibility. A council of ministers held office only on confidence of the House of the People where it had a majority support. That would mean that no bill could

have been passed in the legislature against the wishes of the council of ministers. No council of ministers would advise the President to return a bill passed by the legislature. Indeed the system was so well established that a pro-forma 'assent copy' was evolved. It would be sent, in duplicate, by the secretary-general of the House, that passed the bill second, to the President in the form of a memorandum through the law ministry secretariat without the countersignature of a minister and would come back to the law ministry secretariat with her/his assent. That office would then keep a copy of the assent and allot an assent number to the bill. Thereafter the Act would be gazetted. The assent copy system continues, but the President's assent is not taken for granted.

It can be seen that a presidential return has been possible only after the 42nd amendment. Before 1976 there was only one case of the President withholding assent. This was the Patiala and East Punjab States Union Appropriation Bill, 1954, passed by the Union legislature as the state had temporarily gone under President's rule. That proclamation was revoked before the bill was submitted for presidential assent and the assent became redundant. Following 1976 there have been three cases of the withholding of assent.

(1) The Indian Post Offices (Amendment) Bill, 1986: President Zail Singh withheld his assent on the ground that the Act would violate the privacy of citizens. Prime Minister Rajiv Gandhi could do nothing about it. Singh's successor, Venkataraman, returned the bill with suggestions for amendment on 7 January 1990. The Janata Dal government did not pursue the matter.

(2) The Salary, Allowances and Pension of Members of Parliament (Amendment) Bill, 2000, was retuned straightaway by the President. In 2001, a revised bill of like nature was passed and received the President's assent.

(3) In May 2006, President Kalam returned to the Parliament, Prevention of Disqualification (Amendment) Bill with

objections. The bill was passed by Parliament again in July and sent to him on 9 August; the President gave his assent.

It may be noted that, on all these occasions, there was a sharp political debate in the media and the public. On such occasions the President plays the role of an opposition, if not as the nation's conscience keeper. Such a role is implicit in the President's oath undertaking to protect, preserve and defend the constitution and to serve the people of India as much as her/his power of appointment and dismissal of the council of ministers.

Ordinarily, however, power of the government rests in the council of ministers whose members are individually members of either House of Parliament and collectively responsible to the House of the People. Of course the ministers are not elected by the Houses. They are responsible to the House that is elected directly by the adult citizens of the country. The parliamentary system thus combines the principle of representation and the principle of responsibility at two different levels.

Ministerial Responsibility

A fine theoretical point is involved in this division of roles. Throughout the democratic world elected officials or law makers are expected to be responsive to the needs and demands. They are not responsible to their electors in the sense of being removable by them. No big state allows recall of elected representatives before the completion of their terms. On the other hand, ministers in a parliamentary system are appointed by the nominal executive head but remain responsible to the elected legislators who enjoy a stable tenure. Some people think that this kind of responsibility leads to instability of the executive. Some others think that this leads to a cabinet despotism, because the cabinet members are but senior leaders

of the ruling party. The party system having become highly centralized and equipped with funding and disciplining power, the second- and third-rank party leaders who come to the legislature as members are not capable of opposing the top leaders of the party who man the council of ministers, more so, the cabinet. On the other hand, they consider it their duty to defend the council of ministers against opposition onslaught.

Both these arguments are partly true and partly false. It is true that the council of ministers can be removed by just passing a vote of no-confidence. While throwing out the council of ministers, members of the House of the People will surely take into consideration the over-all interest of their parties. For the ruling party members it would mean loss of power altogether. The council of ministers, on its part, has a powerful weapon at its disposal—dissolution. No law maker likes an election before the expiry of her/his complete tenure. On the other hand, party rebellion caused by factionalism and backbenchers' ire is a rare phenomenon, but not altogether impossible in any democratic system. Ministers as party leaders can ignore their followers' sentiment only to their own peril. Two kinds of reciprocal instability, thus, keep the checks and balance and, consequently, stability in the parliamentary/ministerial system: (a) dismissal (of the council of ministers) versus dissolution (of legislature), (b) party discipline versus factionalism and/or backbenchers' rebellion.

There have been attempts in the Indian legislative practice to make a distinction between a vote of no-confidence and a vote of censure. It is held by some that a censure may be against an individual minister as well as against the entire cabinet, and it need not lead to resignation, while a vote of no-confidence is against the entire council of ministers and must lead to resignation. In Britain the distinction is absent. A vote of censure is passed when a council of ministers sticks to office after losing the confidence of the House of Commons.

A censure against one minister is cause enough for resignation of the entire cabinet by virtue of the principle of collective responsibility.

In the mid-1990s a demand was raised for limiting the scope of no-confidence motions in the legislature for the purpose of ensuring greater stability of the government. There already is a restriction on repeating a no-confidence motion in the same session through legislative rules. Insisting on a greater stability will curtail legislative control on the executive—the essence of parliamentary government. On the other hand, a council of ministers, that has lost majority support and still wants to ride roughshod over the legislature, may find it impossible to work. The legislature may put hurdles to the smooth working of the government at every stage—from passing of bills to sanction of funds for government. At the same time, a steady decrease in the frequency of no-confidence motions is discernable over the years. In the early years the opposition was rather impatient with the slowness of achievements of the government. The strength of the party system was not adequately realized either. Gradually the frivolity of frequent no-confidence motions sank in.

Certain interesting features of the no-confidence motions have been revealed. No no-confidence motion has ever been passed in the House of the People. It was once dodged—by Morarji Desai in 1979. On the other hand, no prime minister lost a first vote of confidence. It was dodged twice—by Charan Singh in 1980 and by Atal Bihari Vajpayee in 1996. There was one occasion when a Prime Minister never asked for a confidence motion, never faced a no-confidence motion, but advised dissolution and obtained it in 1990. The Prime Minister was Chandra Shekhar and President R. Venkataraman. The situation was anomalous but unavoidable, given the party configuration. The President could not be blamed as he ordered dissolution after consulting major parties. On the other hand,

no Prime Minister won a second confidence motion, showing the waning trust that he enjoyed in the House of the People. Confidence motions are dictated by coalition politics. No-confidence motions are ubiquitous.

The system of ministerial government—the 'cabinet system'—developed in the United Kingdom in a bi-party system and gave birth to the principles of unity, solidarity and Prime Minister's leadership. The concepts were based on a clear majority of the ruling party. When this majority is not clear the principles get watered down, as in the case of the long political confusion in the U.K. between 1930 and 1940—a phase characterized by coalition of parties. In such a situation the Prime Minister's leadership becomes weak and unity loses firmness. At the Union level in India coalition-like governments appeared in 1977. A real coalition government was set up in 1996. This requires deft leadership of the Prime Minister, his ability to handle the coalition partners, conceding their demands even at the cost of his own party's apparent interest. A coalition government is, undoubtedly, a weak government. Paradoxically, a coalition government strengthens the position of the Prime Minister in his own party as he is, usually, more acceptable to the coalition partners than any other leader of his party.

The Attorney-General

Although government has its Ministry of Law, its chief legal adviser is the Attorney-General. The President appoints a person qualified to be a judge of the Supreme Court as the Attorney-General who holds office during the pleasure of the President. He is a part of the Union executive and his duty is to advise the government of India in legal matters, to discharge the duties of legal character assigned to him by the President and to perform such duties as are conferred on him by the constitution or any law for the time being in force. He has the

right of audience in all courts in India and to speak in and otherwise take part in the proceedings of the Houses of Parliament, separately or jointly.

The Civil Services

Public services in India broadly come under two heads, civil, running the administration, and military, defending the country. The recruitment, training, deployment, discipline, salaries and service conditions of the military servants are dealt with by the defence ministry.

The civil service—described as 'the steel frame' of British administration—was the most durable contribution of the *Raj* to independent India. It was based on the Indian Civil Service Act of 1861 that replaced the old system of patronage by competitive examinations in the matter of recruitment. The first consequence of the replacement of patronage is stability of tenure which, in turn, dictates the third principle – political neutrality of the civil servants enabling them to serve the changing political regimes characteristic of parliamentary democracy. The structural principle is hierarchy – a chain of command that translates the decisions of the political executive, i.e., the council of ministers through the ministers and the secretaries into administrative dictates for administration of the policies. Individual ministers are the links between the council of ministers and the secretaries/departmental heads. These officials report directly to the ministers and not to the legislature. The legislature, in turn, keeps a watch on the individual ministries/departments, particularly through the committees. The committees may summon officials for evidence. It is for the ministers to take political responsibility for the actions of their senior officials, to defend them and, if necessary, to pull them up. Before the courts of law, however, it is the officials, and not the ministers, who answer for the ministry/department.

Shortly after Independence the Indian Administrative Service (IAS) was created with a view to the eventual replacement of the Indian Civil Service; and the Indian Police Service (IPS) was remoulded with a view to the emerging federal structure. Article 312(2) of the Indian constitution confirmed their status. The then Article 314 allowed the continuation of the old civil servants on the old terms as far as they were practicable. This article was dropped in 1972 by the 28th amendment. A new Article 312A empowered Parliament to vary or revoke their terms of office and retirement. In 1963 another all-India service was created—the Indian Forest Service (IFS). Subsequently, two, specialized, all-India services were created: the Indian Economic Service and the Indian Statistical Service. Whereas the all-India services are common for the Union and the states, there are exclusive Union civil services, like the Indian Foreign Service, the Indian Revenue Service, the Indian Postal Service and the Central Secretariat Service, besides the State Civil Services.

The All-India Services Act, 1951, amended in 1963, institutionalized the three services – the Indian Administrative Service, the Indian Police Service and the Indian Forest Service. The IAS and the Indian Forest Service personnel are controlled by the Ministry of Personnel, Public Grievances and Pension, Department of Personnel and Training as are those of the Indian Economic Service and the Indian Statistical Service. The members of the Indian Police Service are controlled by the Union Home Ministry. Members of the other services, like the Indian Foreign Service and the Indian Revenue Service, are controlled by the related ministries. Public servants at the Union level hold office during the pleasure of the President (as all public servants at the state level do it at the pleasure of the state governors). But the constitution gives them certain protection. They may not be dismissed or reduced in rank by an authority subordinate to one that had appointed them and

without holding an inquiry and informing them of charges giving them an opportunity to reply. These protections, however, are not available to persons convicted on criminal charges or in whose cases holding enquiries or communication of ground would not be feasible or not in the interest of security. The 42nd amendment empowered Parliament to create administrative tribunals to decide disputes and complaints about recruitment and conditions of service of Union and state officials (Art. 323). Consequently, Parliament passed the Administrative Tribunals Act, 1985.

IX

THE UNION GOVERNMENT II
The Legislature

Without the President, Parliament in India is just the legislature. Its functions are primarily two: legislative, i.e., passing of laws, including the financial sanctions; and making of policy decisions through debates and discussions. The legislature is bi-cameral, comprising the Council of States (also known as the Rajya Sabha) and the House of the People (also known as the Lok Sabha). Although parliamentary practice in India has a great deal in common with the British parliament, bicameralism of the Union legislature of India has nothing to do with that. Rather, it is based primarily on the federal practice, starting with the USA, of having two chambers: one representing the federated states and the other representing the people of the nation. But, there are certain differences in the composition of the Council of States in India with the US senate.

The maximum membership of the Council of States is 250, of which not more than 12 is nominative. Such members are picked up from people having special knowledge or practical experience in the fields of literature, science, art and social service by the government. The practice smacks of nomination of life peers in the British House of Lords from people of distinction. Not more than 238 members, on the other hand, may be elected representatives of elected members of the states legislative assemblies by means of proportional representation.

Unlike in the USA, where representation of states to the senate is uniform, in India the strength of the states' representative varies from state to state on the basis of the strength of population. Such numbers are fixed in the fourth schedule to the constitution. Now it varies between 31 in Uttar Pradesh, the state with the largest population, and one each in the small states of Goa, Nagaland, Manipur, Tripura, Meghalaya, Sikkim, Mizoram, Arunachal Pradesh and Pondicherry. The strength of each state's representation may vary with the reorganization of states. At present only two of the seven Union territories have representation in the Council of States – the National Capital Territory of Delhi (3) and Pondicherry (1) because they alone have legislative assemblies.

The House of the People is to consist of not more than 550 popularly elected members, of which not more than 530 will be elected from the states and not more than 20 from *all* the Union territories. At present there are 530 members elected from the states and 13 members from the Union territories. There are two nominated members from the Anglo-Indian community. The number of seats allotted to the states varies according to the strength of their population, as far as possible, in even ratio. This number will be split into territorial constituencies, as far as possible, in even proportion of population ascertained by the previous census. This is done through the appointment of a delimitation commission. By the 84th amendment in 2001, however, the next readjustment of constituencies has been fixed after the census following 2026. The strength of representation of states in the House of the People after the 14th general election varied from 80 in Uttar Pradesh to 1 each in Mizoram, Nagaland, Sikkim (states) and Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, and Lakshadweep (Union territories). Seats are reserved in the House of the People for (a) the scheduled castes, (b) the scheduled tribes except the

autonomous districts of Assam and, separately, for (c) the scheduled tribes in the autonomous districts of Assam in proportion of the numerical strength of the communities (Article 330). There may be not more than two Anglo-Indian members nominated by the President if, in her/his view, the community is not adequately represented in the House. The provisions for reservation and nomination are temporary. They were initially made applicable for ten years, but were successively extended through amendments.

Membership Obligations

In order to seek election to be member of Parliament, one has to be a citizen of India, to be 25 years of age in case of the House of the People and 30 in case of the Council of States and possess such qualifications as may be prescribed by any law of Parliament. No one can be member of both the Houses of Parliament. No one can be member simultaneously of a House of Parliament and a state legislature. This restraint, however, applies only after a member takes the oath. In 1999 Giridhar Gomango, a member of the House of the People, became Chief Minister of Orissa. He voted in the House, on a confidence motion, on the plea that he had not yet become a member of the state legislature of Orissa. The Speaker noted that, earlier, members, on being appointed ministers in states, had attended the House but did not vote. He left the matter to 'the good sense' of the member, who did vote.

A candidate for election to Parliament will have to make or subscribe an oath or affirmation to the Election Commission or a person on its behalf in the following language:

> I, A.B., having been nominated as a candidate to fill a seat in the Council of States (or the House of the People) do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the constitution of India as by law established and that I will uphold the sovereignty and integrity of India.

After being elected, the person has to take an extended oath that commits her/him to faithfully discharge her/his duty upon which (s)he is about to enter. A member of any House becomes subject to disqualification for being chosen as and being member of a House on ground of holding an office of profit, or being of unsound mind, or being an un-discharged insolvent, being not a citizen of India or having voluntarily acquired citizenship of a foreign country, or disqualified by or under any law made by Parliament, or violation of the tenth schedule banning defection (Article 102). Such questions will be referred to the President, and the President's decision will be final. Before giving her/his decision, President shall obtain the opinion of the Election Commission and shall act according to such opinion (Article 104). However, according to the tenth schedule, the presiding officer of a House is the final authority on disqualification of a member on the ground of defection. If a person sits or votes as a member of either House before taking oath or affirmation or being aware of her/his disqualification, (s)he will be fined Rs 500 per day.

Besides these disqualifications, membership of Parliament or a state legislature may cease also in the following eventualities: death; resignation; continuous absence for more than 60 days without permission of the House, the days of prorogation or adjournment for more than four consecutive days excepted; election to a House of Parliament while being member of another House or of a state legislature. In the wake of the *navanirman* movement in 1974 in Gujarat, forcing the legislators to resign, the 33rd amendment of the constitution that year provided that if, from information received or otherwise and after making such enquiry as he thinks fit, the Chairman or the Speaker of the concerned House is satisfied that such resignation is not voluntary or genuine he shall not accept it (Articles 101 and 190).

The Representation of the People Act, 1951, has further

disqualified the persons convicted of certain offences to be members (of the Union and the state legislature). Section 8 of this act mentions certain offences punished by fine or imprisonment.

(1) A person convicted of an offence punishable under—

(a) Section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or Section 171E (offence of bribery) or Section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of Section 376 or Section 376A or Section 376B or Section 376C or Section 376D (offences relating to rape) or Section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of Section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or

(b the Protection of Civil Rights Act, 1955 (22 of 1955), which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or

(c) Section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or

(d) sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or

(e) the Foreign Exchange (Regulation) Act, 1973 (46 of

1973); or

(f) the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or

(g) Section 3 (offence of committing terrorist acts) or Section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987).

Following these convictions, persons are disqualified for membership for six years after the imprisonment is over. Any other offence punished by imprisonment for two years will attract similar disqualification. The only exception is in favour of the sitting members of Parliament or a state legislature who will get a reprieve for three months to appeal against the conviction and, depending upon the court's proceedings, further period of litigation. Persons convicted for corrupt governmental practice shall be disqualified for five years. Persons convicted of corrupt electoral practice will be, subject to the determination by the President, disqualified for a period up to six years. If the candidates contesting in election fail to submit election account shall be disqualified for a period up to three years. Persons under a government contract or serving government companies (companies in which government has 25 per cent or more share) will be disqualified for the period or the service.

There are practically two ways in which members may lose their membership (even without being disqualified). (1) Loss of membership may result from prolonged absence in a House without permission which is a routine administrative affair. (2) It may also result from punishment handed over by a House. Much controversial is the legislatures' privilege to expel their members on ground of unethical/unbecoming behaviour.

In 1951 H.G. Mudgal was expelled from the House of the People for lobbying on behalf of some industrialists—a

behaviour considered unbecoming of a member of Parliament. Mudgal resigned before the order was passed. In 1976, in the middle of the controversial internal emergency, Subramanian Swamy was expelled from the Council of States on charges of carrying on anti-India campaign abroad and forging signature on the attendance register of the House, a charge that Swamy denied. In 1978, Indira Gandhi, along with R.K. Dhawan and D. Sen, was imprisoned and expelled from the sixth House of the People on the charge of intimidating Parliament officials during the emergency. The seventh House, in 1981, rescinded the decision, simultaneously deciding that the 1978 incident will not be a precedent on parliamentary proceedings. In 2007, ten members of the House of the People and one member of the Council of States were expelled on charges of accepting money for raising question in Parliament and arranging commissions on the members of Parliament Local Area Development (MPLAD) fund. In the last case, the aggrieved members went to the Supreme Court but lost the case. No other disqualification attaches to loss of membership. An expelled member may contest an election immediately after election, to the same House or another House or a subsequent one (See below for details of the case).

Working of the Houses

In common parlance, the British House of Lords, a hereditary and nominated body, the U.S. Senate, the representative body of the federated states, and the Council of States in India are generally referred to as the second chamber and as the upper House. The justification of the description as a second chamber may be that, in the common person's view, a nationally representative body is the first and foremost part of a democratic legislature. All the specially constituted bodies may come later. The justification of the description as the upper House is that it is composed with a more restricted membership.

The House of Lords today has lost much of its old power and glory. It has little power over legislative bills compared to the House of Commons, and virtually no power over financial proposals. Yet, it is composed of aristocrats, veteran politicians and other dignitaries, and, formally, is the highest court in the country. The U.S. Senate, however, is equal in power over legislative (including financial) affairs with the House of Representatives and, in respect of appointment of officials and foreign affairs, more powerful than it. The Council of States in India is structurally patterned after the U.S. Senate, but, in respect of power, resembles the House of Lords more. Its claim to the status of the upper House rests in its composition. Like the U.S. Senate it represents the states rather than the people. More important, its membership is made up mostly of senior politicians (many of whom could not make it to the House of the People). Such members have great control over members of the House of the People, in the bulk made up of junior politicians. It is fashionable in the media to describe this House as the House of the elders.

The Council of States is a permanent body. One third of its membership is renewed every two years through election. The House of the People has a maximum life of five years. However, the duration may be extended, during an emergency, by Parliament by law for a period of one year at a time but, in no case, beyond a period of six months after the end of the emergency. Only once in India's parliamentary history, during the internal emergency, was such an extension made from 1976 to 1977. The House is constituted by notification of the Election Commission, but dissolved by order of the President on the advice of the council of ministers. There is no minimum duration of the House. The quorum of each House meeting is one-tenth of its strength. Each House has a secretariat of its own under the authority of the Speaker, in the case of the House of the People, and the Chairman, in the case of the

Council of States.

The summoning and proroguing of a session of either House is on the order of the President. But they are adjourned by the Chairman in the case of the Council of States and Speaker in the case of the House of the People. The Vice-President of India is ex-officio chairman of the Council of States; Deputy Chairman is elected by the members of the House. The House of the People is chaired by its elected Speaker and, in his absence, the elected Deputy Speaker. Both the Houses elect panels of members who would preside over their sittings in the absence of the respective officials. The posts of Deputy Chairman of the Council of States and of the Speaker and Deputy Speaker of the House of the People fall vacant on end of their membership of the respective Houses, or resignation or by a resolution passed by a House by a majority of the then total membership. Salaries of these officials, as also of the members, are fixed by laws of Parliament.

The roles of the Chairman and the Vice-Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People are crucial to the working of parliamentary democracy in India. The Chairman and, in his absence, the Vice-Chairman of the Council of States presides over the sittings of the House. The Speaker and, in his absence, the Deputy Speaker presides over the House of the People. The Vice-President of India is the ex-officio Chairman of the Council of States, but the Deputy Chairman is elected by the Council from among its members. The Speaker and the Deputy Speaker of the House of the People are elected by members from among themselves too. The Chairman of the Council of States may be removed only as the Vice-President of India. The other officers may be removed from their respective positions by ordinary majority. They preside over the sittings of the respective Houses except when their removal is under consideration. The Chairman of the Council of States/the Vice-

President of India does not preside over the Council of States when he is functioning as President of India. The presiding officers adjourn sessions of their Houses and reconvene them after adjournment. A convention is growing in the country for the Chairman of the Council of States and the Speaker of the House of the People to quit their parties to play a neutral role in the legislature. They do not vote in the Houses but may register a casting vote in case of a deadlock in the House. Many of these officials have gone back to their parties after quitting office.

The Speaker does not speak so much in the House of the People as for it vis 'a vis the executive. The Speaker presides not only over the House of the People, but also of the joint sittings of the two Houses when the President orders them to sit together. When the President addresses a joint session of the two Houses, however, no one else is in the chair. As in the case of the British queen's address to Parliament, the President of India is in command. His role as a guardian of parliamentary proceedings has given the Speaker great status. He disciplines the members and, sometimes, throws out the rowdy ones. His rulings guide the Speakers of the state legislative assemblies. Some of the decisions of the Speakers on disqualification of members under anti-defection law and violation of parliamentary ethics have, however, proved controversial. He occasionally convenes the conference of presiding officials of the state legislatures. He fiercely defends the rights and privileges of the legislators against judicial intervention. The Chairman of the Council of States performs similar functions in that Council.

The language used in the proceedings is Hindi or English. Though the Speaker may permit a member, without proficiency in either of these languages, to speak in her/his mother tongue, the proceedings are recorded only in those two languages. No discussion on the conduct of a judge of the Supreme Court or

a High Court is permitted in Parliament except by way of presenting an address to the President praying for the removal of the judge. At the same time, courts are not to inquire into the regularity of its proceedings. No officer or member of Parliament in whom powers are vested by or under the constitution for regulating procedure or the conduct of business, or for maintaining order, in Parliament shall be subjected to the jurisdiction of any court in respect of the exercise by her/him of those powers.

The Committees

Each House sets up any number of committees as it feels necessary with the exception that the Council of States does not have a committee of its own on financial affairs. The Speaker of the House of People and the Chairman of the Council of States nominate the members of several committees. There are, however, joint committees of the two Houses some of which relate to finance, like the public accounts committee since 1954. Broadly, the committees are of two types: standing committees and *ad hoc* committees. The standing committees, engaged in routine works, are of five types:

Financial committees: committee on estimates of the House of the People, public accounts committee and committee on public undertakings.

House committees: relating to the day-to-day business: business advisory committee, committee on absence of members from the sittings of the House, committee on private members' bills and resolutions, rules committee.

Enquiry committees: committee on petitions and committee of privileges.

Committees on scrutiny: committee on government assurances, committee on subordinate legislation, committee on papers laid on the table, committee on welfare of scheduled castes and scheduled tribes.

Service committees: concerned with providing services to members: general purpose committee, library committee, and joint committee on salaries and allowances of members of Parliament.

The *ad hoc* committees are of two types: (1) committees constituted to enquire into specific matters, and (2) select committees on legislative bills.

The committee system was not created by the constitution but is acknowledged by Article 105 that lays down the powers, privileges and immunities of the members, committees and the Houses. Each House lays down its rules of procedure. Committees are multi-party bodies where discussion and consensus, rather than voting, is the rule. However, members can furnish their note of dissent. Perhaps the most prestigious of the committees is the committee on public accounts usually chaired by an opposition member. The main idea behind the committee system is to examine the functioning and finance of the government by experts irrespective of party affiliation. The committees can examine ministers, bureaucrats and witnesses from among the public but have no member from among them. Committees and members of Parliament are provided with secretarial and research support and the library facilities along with housing and perks.

Among the standing committees the department-related standing committees are a major innovation modelled on the United Kingdom's departmentally related standing committees. Their functions are to (1) consider the demands for grants of the related ministries/departments and report on them without suggesting any cut; (2) examine bills pertaining to the related ministries/departments, referred to them by the Speaker of the House of the People or Chairman of the Council of States as the case may be, and report on them; (3) consider the annual reports of the ministries/departments and report on them; (4) consider national basic long-term policy documents presented

to the Houses, if referred to them, and report thereon. All members of the two Houses are divided into 24 committees, keeping in view the interests of the individual members. The strength of such a committee may not exceed 31 (21 from the House of the People, 10 from the Council of States). These committees, which do not have ministers as their members, are different from the parliamentary consultative committees that a ministry may set up under the chairmanship of the minister.

Privileges of the Legislature and its Members

Subject to the provisions of the constitution and the rules and standing orders on procedure of Parliament there is freedom of speech in Parliament. Authentic proceedings are published by the Houses without interference (Only once in the history of Parliament of India were the proceedings censored – during the 1975-77 emergency). No member is liable to any proceedings in any court in respect of anything said or any vote given by her/him in Parliament or in any of its committees and no person is liable in respect of publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings. No person will be liable to a civil or criminal proceeding in a court for publication, in a newspaper, substantially true accounts of the legislative proceedings, unless such publication is proved to have been made with malice.

The Houses have not yet codified the powers, privileges and immunities of members. Codification of privileges will subject them to the other provisions of the constitution, particularly, the fundamental rights of the citizens. They are following the practices of the British House of Commons. These privileges are equally applicable to a person who addresses a House of Parliament or any committee. The practices in the House of Commons were expressly referred to in the original constitution. The 42nd and the 44th amendments changed

the language successively. The final words are: 'those of that House and of its members and committees immediately before the coming into force of Section 15 of the Constitution (Forty-fourth Amendment) Act, 1978.'

In 2005 a critical constitutional controversy cropped up as a result of what is known as the 'cash for query' and Members of Parliament Local Area Development (MPLAD) fund scams leading to the expulsion from membership of 10 members of the House of the People and one of the Council of States. The decisions were challenged in the Supreme Court on three grounds: (1) There is no provision in the constitution authorizing the Houses to expel members although Articles 102 and 103 provided for disqualification of members. (2) There was prejudice—a predetermined judgement – behind the decisions as, allegedly, revealed in the statement of the Speaker of the House of the People, 'the guilty will be punished'. (3) The expulsion of members deprives the right of the constituents to be represented. The Supreme Court turned down all the pleas on the following grounds: (1) Expulsion is a punishment and not disqualification. (2) The observation of the Speaker had been torn out of context. (3) The constituents' right of representation was not taken away because there would be bye-elections to fill the vacancies. Simultaneously the court asserted a controversial position.

This assertion came against the government advocate's plea that the court had no jurisdiction to review a privilege of the Houses of Parliament that are modelled on the self-constituted and, therefore, sovereign British parliament. Drawing upon its own opinion on the presidential reference of the *Keshav Singh* case of 1964, the Supreme Court turned down the plea on the ground that the Indian parliament is a product of the constitution and not self-constituted and, therefore, not sovereign in the British sense. In effect, the court asserted the right to review a decision on privilege of a House of Parliament.

Anti-defection Law

A reference to the anti-defection law (tenth schedule to the constitution) is relevant here. The schedule was added by the 52nd amendment in 1985. It provided that a member of a political party belonging to a House of Parliament or a state legislature would be disqualified if (a) (s)he voluntarily gives up membership of the party; or (b) if (s)he votes or abstains from voting in such House contrary to any direction issued by the party to which (s)he belongs or any person or authority authorized by it in this behalf, without obtaining prior permission and her/his action has not been condoned by the party, person or authority within 15 days of such voting or abstention. An elected member of a party would mean one who had been set up as a candidate of the party. A nominated member would be deemed to belong to a party if, on the day of her/his nomination, (s)he was member of a party or if (s)he joins a political party within six months of her/his nomination. The provision will not apply in case of merger of parties by decisions of at least two-thirds of their members. It will also not apply on persons who do not accept the merger and choose to function as a separate group. A complimentary provision in the 52nd amendment (paragraph 3 of the schedule) also exempted split groups of at least one-third of the members of a party. It was dropped by the 91st amendment in 2003. The Speaker and the Deputy Speaker of the House of the People, and the Chairman and the Deputy Chairman of the Council of States, who leave their parties on election to the posts, are exempted from the provision. They are free to join a party after ceasing to hold the posts.

The first ruling under the anti-defection law was passed in the Lok Sabha in November 1990 when Speaker, Rabi Ray, declared 28 members of the Janata Dal "unattached" after they were expelled from the party by the Janata Dal leader in Parliament, V.P. Singh. The law does not provide for the

recognition of some members as "unattached", but neither does it provide for disqualification of members who have been expelled from a party. Subsequently, Ray recognized the Janata Dal(S), headed by Chandra Shekhar, which consisted of 54 members of the Janata Dal parliamentary party. These 54 included the 28 "unattached" members. Ray, however, disqualified 7 members of the Janata Dal, including V.C. Shukla and 4 others who were then ministers in the Chandra Shekhar Government, for defecting to the Janata Dal(S). Ray thus interpreted the law to establish that a split was a one-time affair.

Shiv Raj Patil, Ray's successor, took quite some time to pronounce his verdict on the splits that occurred in the Janata Dal when he was Speaker. In the case of the first split, that occurred when Ajit Singh and 20 other MPs broke away from the Janata Dal, he took nine months to pronounce his judgment and allowed a cumulative defection to give it the character of a split. In the second instance, when 7 members quit the Ajit Singh faction, he took two years to recognize the split.

Powers of the Legislature

The concept of parliamentary supremacy is somewhat nebulous even in the United Kingdom. It is the King in Parliament that is sovereign there. In India it does not apply for the following reasons: (1) There is a written constitution that is the supreme law of the land. (2) There is a Supreme Court to interpret the constitution, and its interpretation is binding on all subordinate courts. It means that, if the Supreme Court says that the law is unacceptable, it may be freely defied in the country. (3) Article 13 expressly forbids any law, old or new, to curtail any of the rights granted in Part III of the constitution. (4) India is a federation. What parliamentary government means is the parliamentary control over the executive.

There is a qualified division of powers between the Union and the state legislatures in India enshrined in the seventh schedule to the constitution. The logic of this division of powers goes against the theory of parliamentary sovereignty and makes the Union legislature more similar to the US congress than the British parliament. The exclusive power of the Union legislature to make laws with respect to certain matters is laid down in the first list of the seventh schedule. In the second list of the same schedule the jurisdiction of state legislatures has been laid down. Parliament's concurrent jurisdiction with state legislature has been spelt out in the third list. In special circumstances Parliament may even legislate on state subjects.

On the other hand, the separation of powers, characteristic of the US constitution, is blurred in India making it a parliamentary system. In a parliamentary system, the legislature controls the executive though, in turn, is led by it. Whereas in the USA, declaration of war is constitutionally a power of congress and the President shares with the US senate the power to make treaties, in India wars are declared and treaties are made by the executive even though 'foreign affairs; all matters which bring the Union into relation with any foreign country' is explicitly mentioned in the first list of the seventh schedule (entry 10). Throughout 2007, the executive stoutly refused to have a vote on the Indo-US nuclear treaty proposal and won the day. They had a debate to take the views of the legislature later.* The only way a vote may be forced on such issues is to move a motion of no confidence as the opposition (unsuccessfully) did in 1968 over an international tribunal's award of a portion of the Rann of Kutch to Pakistan. There is no clear provision in the Indian

* The issue, however, split the ruling alliance forcing the Prime Minister to seek a vote of confidence in July 2008.

constitution relating to separation of power between the executive and the legislature.

Neither the House of the People nor the Council of States has any executive or judicial power. But the executive in a parliamentary government is responsible to the legislature. The legislature in a parliamentary government has the ultimate weapon of moving a no-confidence motion. However, this authority belongs to the House of the People alone (The House of the People scores over the Council of States in another respect – controlling the finance of the government). As the constitution does not make a difference between a no-confidence motion and a censure, the rules of procedure of the House of the People or the Council of States does not provide for a censure. In the House of the People, a motion in the nature of a censure is recorded as 'no-date-yet-named motion'. Unlike the no-confidence motions such motions receive no priority. On the other hand, the rules for the House of the People provide for a motion of no-confidence while those of the Council of States do not. Rules of the Council of States expressly prohibit a motion in the nature of censure or no confidence. It is not even allowed an adjournment motion which involves a degree of censure. On the other hand, the Council of States scores a point over the House of the People in holding the key to parliamentary legislation over state subjects, by means of a resolution passed by two-thirds of its members, in national interest.

One thing is clear. Whereas collective responsibility of the council of ministers is a constitutional/legal provision, there is no individual responsibility of a minister in the constitutional structure. Beginning with T.T. Krishnamachari in the 1950s, some ministers have been forced to quit by criticism in the Houses; but such removals have been made by the Prime Minister to avoid embarrassment for the government rather than through any official censure in a House. In fact, the

removal of Krishnamachari was the result of the exposure of the Mundhra-LIC scam.

There are ways by which both the Houses can check and monitor, if not control or embarrass, the executive. Ministers are members of the legislature and are subject to peer pressure. (Members of the Council of States being senior members of the parties, their pressure can be telling on ministers who may be junior in age and rank in the party.) The most effective way is interpellation—questioning. One hour from the start of a day's proceedings is set as the question hour when members have opportunity to ask ministers questions on their performances—both written and unwritten. Notice is required for such questions to prepare the ministers to answer. The answers have to be correct or the minister will face privilege proceedings. Members may ask for short duration discussion on a subject without voting. They may call the attention of ministers to particular matters. They can mention matters. They may present petitions to a House either themselves or on behalf of the public on public interest. They may move resolutions in a House expressing opinion on matters, members of the House of the People going to the extent of even disapproving of an act or policy of the government. They may move adjournment motions demanding urgent discussion of a matter suspending the proceedings of the House. Such a motion suggests that the executive has hitherto ignored the important matter, and is censorious. They are not allowed to the Council of States. A practice of 'zero hour' immediately following the question hour has evolved outside the frame of rules. Members, at that time, may raise what they consider urgent matters. Sometimes, however, the zero hour turns unruly.

Legislative Procedure

There is no hard and fast rule about the timing of the sessions

except that not more than six months shall elapse between the last day of one session and the first day of the next session of a House. This provision sees that a general election to the House of the People should be held during the six-month gap. On a rather extraordinary situation in 2002, over holding of election to the Gujarat Assembly, however, the Supreme Court held that the six-month rule may not apply in case of dissolution of a House (See chapter XIII). The long-term implication of this ruling, however, may be dangerous for the health of parliamentary democracy if a council of ministers seek to cash it in. The Houses usually sit simultaneously, or almost simultaneously, because of the requirement of the bills to be passed in both the Houses.

There are, generally speaking, two kinds of legislative proposals: the financial bills and the non-financial, ordinary, bills. The former refer to all bills relating to revenue or expenditure of the government; the latter to other matters. The financial bills, in turn, are divided into two kinds: the money bills and the financial bills other than money bills. The money bills are those bills which contain only provisions dealing with all or any of the following matters:

(a) the imposition, abolition, remission, alteration or regulation of any tax;

(b) the regulation of the borrowing of money or the giving of any guarantee by the government of India, or the amendment of the law with respect to any financial obligations undertaken or to be undertaken by the government of India;

(c) the custody of the consolidated fund or the contingency fund of India, the payment of moneys into or withdrawal from any such fund;

(d) the appropriation of moneys out of the consolidated fund of India;

(e) the declaring of any expenditure to be expenditure charged on the consolidated fund of India or the increasing of the amount of any such expenditure;

(f) the receipt of money on account of the consolidated fund of India or the public account of India or the custody of or issue of such money or the audit of the accounts of the Union or of a state; or

(g) any matter incidental to any of the matters specified above.

A bill shall not be deemed to be a money bill by reason only that it provides for the imposition of fines or other pecuniary penalties, or for the demand or payment of fees for the licenses or fees for services rendered (though such income comes into the public fund of the government), or by reason that it provides for the imposition, abolition, remission, alteration or regulation of any tax by any local authority or body for local purposes. On the other hand, an ordinary bill which contains provisions involving expenditure from the consolidated fund of India is a financial bill other than money bill. If any question arises, whether a bill is a money bill or not, the decision of the Speaker of the House of the People will be final. When a money bill is transmitted to the Council of States and when it is presented to President for her/his assent it shall carry a signed certificate of the Speaker that it is a money bill.

Private members, thus, have no right to move financial bills. They do not have much scope for moving non-financial bills either. One afternoon in a week, the Friday, is earmarked for private members. If their bills or motions get official backing, they are usually told to withdraw their moves with an assurance from the government to bring on a better-framed bill. After all, drafting a bill is a business of the experts.

There are usually three 'readings' of a bill in a House. In the first reading, the bill is introduced with a brief statement. In the second reading, extensive debate and discussion occur. After that, in most cases, the bill is sent to a select committee of the House or to a joint committee of the Houses or, in rare cases, is circulated for the purpose of eliciting public opinion.

The committee gives its views on technical details or feed back from the public is received before the bill goes through the third reading in which amendments may be made. This is the British legislative procedure too. The U.S. procedure differs in placing the committee before the second reading, allowing the committees to give their view on the substantive policy aspects too.

In respect of non-money bills and the financial bills other than money bills, there is a formal parity between the two Houses. If one House passes a bill and the other declines to, or fails to, pass it within six months, or the two Houses disagree on amendments to be made to the bill, then the President shall cause the two Houses to meet in a joint sitting. In such a joint sitting, presided over by the Speaker of the House of the People, joint voting shall decide the fate of the bill. By a straight calculation, the House of the People being more than twice the Council of States in number should have an easy victory. But the party system may alter the equation. Suppose the X party has a majority of 10 members in the House of the People compared to the Y party, but is in a minority of 20 members in the Council of States. In such a joint voting the Y party will win.

A bill pending in Parliament shall not lapse by reason of the prorogation of the Houses. A bill pending in the Council of States which was not passed by the House of the People shall not lapse on dissolution of the latter. A bill which is pending in the House of the People, or which, having been passed by it, is pending in the Council of States will, unless a joint sitting of the two Houses is held, lapse on a dissolution of the House of the People.

Government Finance

Since the *magna carta*, historians have considered the legislative control of government fund to be the key to

legislative control of the executive. Running the government every day needs money and sanction of that money is the power of the legislature. Money bills and financial bills other than money bills are exclusively governmental affairs for it is the government that knows how much money it requires and how to collect it. They have to be moved under the authority of the President, which can be obtained only by a minister.

The constitution created two funds and empowered Parliament to set up a third one. The consolidated fund of India was made up of all revenues received by the government of India, all loans raised by the government by the issue of treasury bills, loans or ways and means advances and all moneys received in repayment of loans [Article 266(1)]. All other public moneys received by or on behalf of the government of India are credited to the public fund of India [Article 266(2)]. A contingency fund of India has been set up by Parliament as per Article 267(1). Whereas parliamentary sanction is necessary for expenditure from the consolidated fund of India and the contingency fund of India, no such control exists on the public fund of India, although it is subject to usual audit by the Comptroller and Auditor-General of India and, therefore, Parliament.

On money bills, the House of the People is decisively superior to the Council of States. Money bills may be moved first only in the House of the People. Once a money bill reaches the Council of States, the latter may pass it and return it to the former within fourteen days with or without recommendations. The House of the People may accept any or all or none of the recommendations after which the bill will be passed. If the Council of States holds the bill for more than 14 days without returning it to the House of the People with or without suggestion of amendment, the bill shall be deemed to have been passed by both the Houses.

Articles 112–17 regulate the annual financial exercise. That exercise is divided into three stages: presentation of the budget, passing of the appropriation bills and passing of the finance bills.

The budget is a statement of estimated receipts and expenditure, also known as the annual financial statement. Before the beginning of the financial year on the 1st of April, usually on the last day of February, the President causes to be laid before both the Houses of Parliament the annual budget of the government. The general budget speech of the Finance Minister contains two parts: Part A, dealing with the general economic survey of the country; and Part B, dealing with the tax proposals. The general budget is non-votable as are non-tax revenue income measures. The tax proposals in the budget speech are, however, debatable.

The estimates of expenditure are divided into two parts: those charged upon the consolidated fund of India which is the central fund of the government, and the expenditure proposed to be made from the consolidated fund of India. The first kind of expenditure is non-votable, as they are committed by the constitution, but debatable. They include the emoluments and allowances of the President and other expenditure relating to her/his office; the salaries and allowances of the Chairman and Deputy Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People; the debt charges for which the government of India is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to raising of loans and the service and redemption of debt; salaries, allowances and pensions payable to the judges of the Supreme Court; the salaries, allowances and pensions payable to the Comptroller and Auditor-General of India; and any sum required to satisfy any judgement, decree or award of any court or arbitral tribunal. But the demands for grants of

the respective ministries are votable. They may be denied or subjected to cut.

Given the enjoyment of the confidence of the House by the council of ministers, total denial is normally unthinkable. Therefore, more frequent use is made by the opposition of the cut motions, not so much to force a cut on government expenditure as to initiate a policy debate or a review. Rule 209 of the House of the People rules allows debate and voting in the form of cut motions that are of three kinds:

(1) Disapproval of policy cut, symbolically demanding a cut of Re. 1. A member giving notice of such a motion shall indicate in precise terms the particulars of the policy (s)he proposes to discuss. The discussion shall be confined to the specific point(s) mentioned in the notice. It is open to the members to advocate an alternative policy.

(2) Economy cut, demanding that the amount be reduced by a specific amount, aimed at effecting economy.

(3) Token cut, demanding the reduction of the amount by Rs 100, aimed at allowing members to ventilate grievances

There is, in Article 115, provision for supplementary, additional or excess grants, if the expenditure goes beyond the budgetary sanction, actually or prospectively, through the same procedure. Article 267, in fact, created a contingency fund to finance 'unforeseen expenditure'.

Actual budget-making exercise is a complicated process with high bureaucratic input. Around November every year, the finance ministry receives demands of the other ministries and departments for the next financial year. The budget is prepared by the Finance Minister in consultation with bureaucrats comprising four secretaries of his ministry (of economic affairs, revenue, expenditure and banking), the Governor of the Reserve Bank of India, advisor to the government of India and the finance minister on monetary

policy, chairmen of the board of central excise and customs and the board of direct taxes and the secretary to the Prime Minister's Office. The discussions are kept secret from the other ministers. Even the Prime Minister rarely attends the budget committee meeting and is kept informed by the secretary in the Prime Minister's Office. The ministers see the budget one hour before its presentation in the House—at the cabinet meeting to finalize the budget. The tax proposals of the finance bill (to be distinguished from the broader phrase, financial bill) become immediately operative after the presentation of the budget. The demands for grants to the respective ministries are read out by the Speaker on behalf of the ministers who, however, do speak while replying to the budget debate. By this time they would have seen the budget.

Like the non-money bills, the money bills go through three readings. Ever since the creation of the department-related standing committees, a practice has grown to refer the demand for grants to such committees after general discussion of the budget. During consideration of the committees the House goes into recess for two to three weeks. The committees cannot propose any cut but may pass comments on the demands. It is for the finance minister and the cabinet to modify any proposal that may be acceptable. The budget, therefore, is hardly a means of controlling the council of ministers. But it offers the best opportunity to debate government policy, criticize the government performance and offer suggestions. Such opportunity is offered also to the Council of States which can debate the budget but cannot vote on it.

Parties in Parliament

Parties have played a critical role in the evolution of parliamentary government, even more than in a presidential system. In Britain, the party system is conventional. But the Ministers of the Crown Act, 1937, accorded the status of a

cabinet minister to the leader of the opposition and paid her/him salary.

Until the 52nd amendment of the constitution in India, the party system was conventional in the same way. A statutory recognition of the parties is now accorded by the Representation of the People Act, 1951 (Section 29A, based on Article 324 of the Constitution and added in 1989). Earlier, the first Speaker of the House of the People, G.V. Mavalankar's directions had laid down the principles of recognition of a parliamentary party/group primarily on the basis of declaration of the members about their party affiliation at the time of election. In 1968, the Election Symbols (Reservation and Allotment) Order introduced the system of registration of political parties and their gradation into national and state parties. Regulations about the election expenses furthered the strength of this recognition. The Election Commission exerted increasing authority upon the working of the parties to the extent that the Shiv Sena of Maharashtra was forced to have election of its office bearers. Of course, the parties have their own constitutions. Within Parliament, they have their parliamentary parties and office bearers. Next to the chairpersons of the parliamentary parties, the whips, led by chief whips, manage the parties' affairs, particularly, assignment of participation in the debates and directions in voting. A landmark in the evolution of the status of the political parties was the Salary and Allowances of the Leaders of Opposition Act, 1977. But the climax was reached with the 52nd amendment in 1985 with mixed results.

The 52nd amendment made it constitutional by setting up the tenth schedule, popularly known as the anti-defection law. That amendment made defection of members from political parties they had contested election with punishable by disqualification. Three exceptions were allowed: (1) A split involving at least one-third of the members of a party

(paragraph 3 of the tenth schedule). (2) A merger of two or more parties (paragraph 4). (3) The Chairman and the Vice-Chairman of the Council of States and the Speaker and the Deputy Speaker of the House of the People (who had to be conventionally neutral) (paragraph 5). While the third exception was unexceptionable, the first proved to be immediately problematic. Problems arose in both Parliament and the state legislature on whether a split is a one-time incident or cumulative. Lack of clarity in this respect failed to substantially reduce the frequency of defection and the presiding officer, dealing with such incidents, came under criticism. The 91st amendment in 2003 was aimed at correcting this major defect by omitting the reference to split.

The justification of anti-defection law, basically, is that when a voter votes for a candidate, (s)he reposes a trust unto the candidate as a member of a political party. When the elected member changes her/his party affiliation (s)he should renew the trust. But three problems remain. In case of a merger, the members were allowed to change their identity. Simultaneously, those members who disagreed to the merger were left free to operate with the older identity. It is possible to see this disagreement as split. But the more general problem concerns the phrase 'political party'. It is possible that the national organization of the party takes a decision that the state unit does not agree to. It is also possible that the members of the legislative wing of the party do not agree to the decision of the national or/and state organization of the party. The problem has been critical with regard to the small political parties who have one or two members in a House.

The most serious problem, however, is structural. After the 52nd amendment two kinds of disqualification have appeared within the scope of Article 102: one relating to qualification proper and the other to behaviour of the members within Parliament. Prior to the 52nd amendment only the first

kind of disqualification obtained and the President, as advised by the Election Commission, was the final referee. The second kind of disqualification has been subject to the decision of the presiding officers of the Houses alone. It has created a great deal of confusion besides bringing the presiding officers into the vortex of party politics. The decisions of the presiding officers in cases of defection have been kept out of the purview of the judiciary by Article 122. But, as the *Raja Ram* case judgement has shown, the Supreme Court has applied its power of judicial review on a related question of membership (expulsion from a House).

Decline of the Legislature?

A general criticism of the legislative trends throughout the world is the decline in its power. The criticism began in the 1930s in Britain with the allegation of the rise of cabinet despotism. It meant that, as governmental work was increasing and becoming complex, the ministers, being party leaders and having at their disposal technical skill of the bureaucrats, were appropriating the legislative initiatives. The party back-benchers have been reduced to yes men, the possibility of party whips always hanging over their heads. On a broader scale, it was subsequently alleged that the committees were dominating the legislative and policy-making businesses. In Britain, a particular ire was expressed against the fact that the committees blurred the partisan and ideological differences. It was paradoxical that members of the opposition whose primary objective was to oppose the government, with a view to its eventual replacement, were called upon to cooperate with the government in fine-tuning its administrative programmes as well as legislative proposals. On a different plane, complaints have been made about the declining intellectual and behavioural standards of the members. In Britain, rise of this

complaint was synchronous with the expansion of the voting right.

In India, all these criticisms are present, but having some distinctions. The department-related standing committees have been found to be overlapping among themselves and with older committees like the public accounts committee, the estimates committee and committee on public expenditure. They are unwieldy and do not conform to the standard of specialization. They have allowed members of the Council of States, which does not have any financial powers, to intervene in departmental/ministerial finance. It is also alleged that members take more time to ventilate inter-party bickering and local political issues than discussion of national political issues so much so that, in the recent period, some budgets had to be passed hurriedly. Occasionally, legislative debates have led to heat and violence.

One great benefit of parliamentary/ministerial system is its diffused power structure which allows a great deal of maneuverability and inclusiveness of the system. This inclusiveness is, paradoxically, the source of some of the maladies like impolite, if not unruly, behaviour of members. Interestingly, a recent survey of Parliament has shown an increased presence of graduates and post-graduates in Parliament. The presence of criminals in Parliament has, on the other hand, been seen to be miniscule. It will, therefore, be wrong to blame cultural factors for some of the ailments of the parliamentary system and abandon it. On the other hand, a presidential system is based on the constitutional supremacy of one individual. Had the USA been not a federation, the President would be the sole arbiter of the destiny of her citizens. It would perhaps not be a democracy at all.

X

THE STATES AND UNION TERRITORIES

Unlike in the USA, the states in India do not have separate constitutions. This is primarily because the US federation was the result of union of sovereign states – a process through which a part of the sovereignty of the states was transferred to the Union. As a result, the USA got two parallel sets of government and constitution. A.V. Dicey called the state legislatures in the USA non-sovereign law-making bodies; William Ivor Jennings called them sovereign within powers. In the Indian federation, on the other hand, the concept of state sovereignty was replaced by the concept of autonomy. The ghost of devolution – characteristic of the British days – however still haunts the Indian federation in the form of several scopes of the Union's intervention into the states' affairs within the framework of a single constitution.

The State Executive

To begin with, the Governor, the head of the state executive, is appointed by the President (i.e., the Union council of ministers). (S)he has to be a citizen of India, 35 years in age and should possess the qualifications to be a member of a state legislature in order to be appointed Governor. The Governor holds office during the pleasure of the President but, ordinarily, for five years. Their salaries, allowances and privileges are fixed by a law of Parliament. The President makes arrangements when a Governor is unavailable in office. Sometimes there are

common governors for two or more states.

Unlike the ministers, however, the governors are not protected by legislative support. Yet, like the President of India, who may be removed from office only by impeachment, the governors take oath to 'preserve, protect and defend the constitution' but may not be removed by impeachment. The question is: may the method and the terms of her/his appointment come in conflict with the oath? Does the loyalty to the constitution begin and end with her/his loyalty to the Union government? As it will be seen, the scope of the governor's power goes beyond the power to appoint and dismiss ministers and to return a bill. The Governor has the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of an offence against any law relating to a matter to which the executive power of the state extends. The Governor has no power on the armed forces because they are under the Union.

There is uniformity in the structures of state governments except for some frontier states that have some special, protective, provisions. Like the Union government, the state governments were built on the parliamentary principles. The reason behind such a choice was that, if the council of ministers, responsible to a popularly elected legislature, wields the real executive power, state autonomy would be best maintained. The Indian nationalists had learnt it while working the Government of India Act, 1935, under British governors. At an early stage of constitution making, there were proposals to have the Governor elected. The idea was abandoned in order to avoid two rival centres of power.

In many ways, the state government is a replica of the Union government in India with a Governor who is not only the executive head of the state but also a part of the state legislature, though not a member of any of its chamber(s). The

Governor summons and prorogues the sessions of the state legislature and dissolves the legislative assembly. (S)he addresses the state legislature, and may send messages to it, in the way that the President addresses Parliament. There is a council of ministers responsible to the popularly elected legislative assembly. Ministers may be members of either chamber or have to be so within six months of their appointment.

There are, however, differences in details with the Union's structure of government. The position of the state Governor is vastly different from that of the President of India. Secondly, all states do not have bi-cameral legislatures. Thirdly, the second chambers of the state legislatures, where they exist, are composed differently from the Council of States. Fourthly, the rules of business of the government and the rules of the legislatures differ in details from those of the Union executive and the Houses of Parliament respectively. In fact, the rules of legislature vary widely among states.

Discretion, Individual Judgment and Special Responsibility

According to Article 163(1), there is a council of ministers to aid and advise the Governor 'except in so far as he is by or under this constitution required to exercise his functions or any of them in his discretion'. This discretion is certainly not a prerogative as a republican constitution does not sanction any prerogative. This discretion is not the 'pleasure' that both the President and the Governors enjoy with regard to tenures of their ministers and Attorney/Advocate-General. The President does not have discretion. Under the original constitution, discretion was formally granted only to the Governor of Assam, and in only two respects: (1) deciding disputes between the government of the state and the district councils on the share of royalty from leases for prospecting for and extraction of

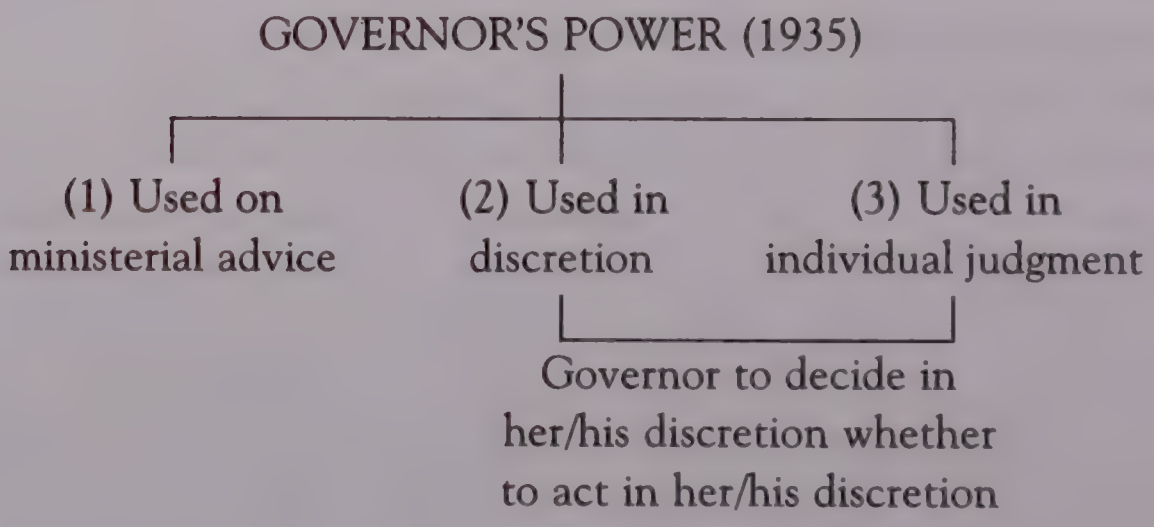
minerals in the autonomous districts [sixth schedule, paragraph 9(2)]; and (2) administration of the Part B tribal areas (sixth schedule, paragraph 20) now comprising Arunachal Pradesh and a part of Nagaland. With the formation of Nagaland and Arunachal Pradesh as separate states, the second discretion of the Governor of Assam lapsed.

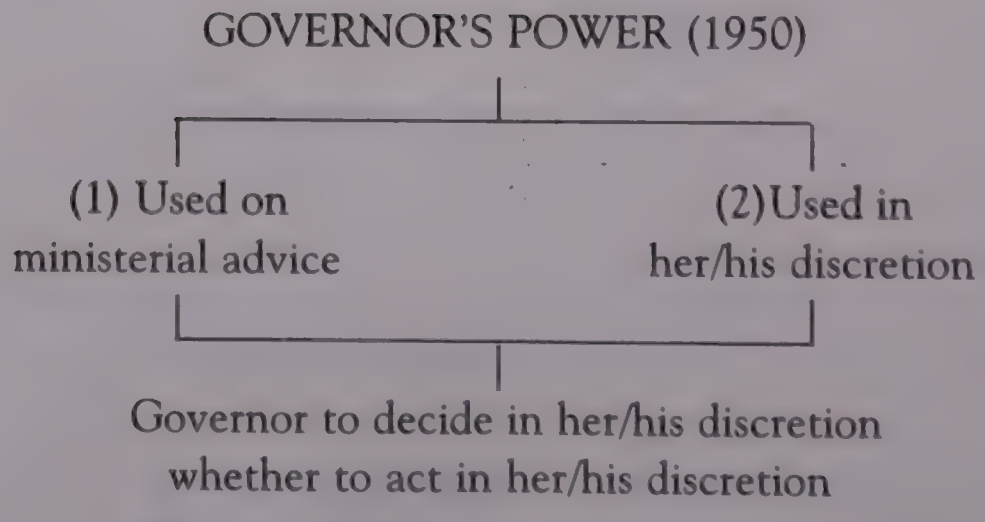
The problem arises with regard to Clause (2) of the article that says that if a question arises whether any matter is or is not a matter as respects which the Governor is by or under this constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. This means that the Governor has unlimited discretion to decide when (s)he can use her/his discretion, and this goes against the spirit of Clause (1) that the Governor shall use her/his discretion only when required to use it by the constitution. The anomaly is due to an inexplicable slip in the adaptation of an almost (but not quite) similar provision of the Government of India Act, 1935.

Under the Government of India Act, 1935, the Governor of a province had three kinds of power: (1) powers to be used on the aid and advice of the council of ministers; (2) powers to be used in the governor's discretion, that is to say, without the advice of the council of ministers; and (3) powers to be exercised in individual judgment in discharging some special responsibilities. On the last powers, the Governors would take the advice of their councils of ministers, but would be free to act on their discretion. It was also provided that, on the question whether the Governor would, in a certain matter, act in his discretion or in his individual judgment the decision of the Governor, in his discretion, would be final (Section 50 of the Act). Both the discretions were limited. The confinement of second discretion between (2) and (3) was, however, ignored

by the constitutional adviser, Sir B.N. Rau, in his memorandum on the provincial constitution, on 30 May 1947, when the Constituent Assembly was toying with the idea of an elected Governor.

Subsequently, the Constituent Assembly decided to have a Governor appointed by the President and, consequent upon the decision, a special committee chaired by Jawaharlal Nehru, on 11 April 1948, decided to remove all references to discretion. The draft article proposed by Rau, however, remains intact in the final text with the result that the Governor has unlimited discretion to decide if on *any* matter (s)he will apply her/his discretion or choose to accept the advice of the council of ministers.


GOVERNOR'S POWER (1935)
(1) Used on ministerial advice
(2) Used in discretion
(3) Used in individual judgment
Governor to decide in her/his discretion whether to act in her/his discretion


GOVERNOR'S POWER (1950)
(1) Used on ministerial advice
(2)Used in her/his discretion
Governor to decide in her/his discretion whether to act in her/his discretion

Reorganization of northeast India and incorporation of Sikkim have created new areas of special responsibilities and individual judgment of the Governors justifying a reconsideration of this controversial Clause of Article 163.

When Nagaland was granted statehood in 1963, Section 50 of the Government of India Act, 1935, was attached *verbatim* to the state's Governor who was given special responsibility for so long as in his opinion internal disturbances occurring in the Naga Hills-Tuensang Area immediately before the formation of that state continue therein or in any part thereof. In the discharge of his functions in relation thereto, the Governor was told to, after consulting the council of ministers, exercise his individual judgment. It was also provided that if any question arises whether any matter is or is not a matter as respects which the Governor under this sub-clause is required to act in the exercise of his individual judgment, the decision of the Governor in his discretion will be final and the validity of anything done by the Governor will not be called in question on the ground that he ought or ought not to have acted in the exercise of his individual judgment.

Today guns have fallen silent in Nagaland and this plenary power of the Governor is not in use. It may be used in future, however, if the circumstances so require. The Governor of Nagaland still has discretion to *finally* decide matters relating to the administration of the Tuensang district of the state. The constitution *specifically* requires the Governors of the states where district councils function under the sixth schedule, i.e., Assam, Meghalaya, Mizoram and Tripura, to exercise discretion in only one matter, i.e., dispute over royalties from prospecting and extraction of minerals.

The Governor of Sikkim has a special responsibility for peace and for an equitable arrangement for ensuring the social and economic advancement of different sections of the state of Sikkim. Subject to such directions as the President of India

may, from time to time, deem fit to issue the Governor discharges his special responsibility in his discretion. The President of India may assign special responsibility to the Governor of Manipur for the proper functioning of the committee of its legislature comprising the members from the hill areas of the state set up by the President of India. No discretion has been attached to this special responsibility of the Governor of Manipur. He has, however, been specially assigned the responsibility to, annually or whenever so required, make a report to the President on the administration of the hill areas of the state. It has further been declared that the executive power of the Union shall extend to the giving of directions to the state as to the administration of the hill areas.

The Governor and the Ministers

The structure and working of the council of ministers in the states is similar to that at the Union level except that the head of the state's council of ministers is called the Chief Minister. The ministers in the states take similar oaths as the Union ministers do. The strength of the council of ministers may not exceed 15% of the strength of its legislative assembly. There is a special requirement of Article 164(1) that in Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh and Orissa there has to be a minister for tribal affairs (as they contain substantial tribal population) with additional charges including the welfare of the scheduled castes and backward classes. Like the Prime Minister of India vis 'a vis the President, the Chief Minister has duties to keep the Governor informed. The law officer in the state, appointed by the Governor, with similar status with the Attorney-General, is called the Advocate-General. The accounts of the state government are scrutinized by the integrated office of the Comptroller and Auditor-General of India.

The relation of the Governor with her/his council of

ministers, compared to that between the President and the Union council of ministers, is problematic. Although it is inconceivable that the Union government will not have a council of ministers at any time—a provision that ties the hands of the President in respect of its advice—there are occasions when a state government may not have a council of ministers. Such occasions result from the imposition of President's rule, when the council of ministers is dismissed and the Governor acts, as agent of the President, in her/his discretion.

The council of ministers, normally, is retained in office so long as it enjoys the confidence of the state legislative assembly to which it is collectively responsible (Article 164). When the council loses the confidence of the legislative assembly, it should resign; or the Governor may dismiss it and appoint another Chief Minister and other ministers. If a Chief Minister, before being defeated in the legislative assembly, advises dissolution of the assembly, that advice should be accepted by the Governor. If, on the other hand, the Governor suspects that the council of ministers has lost the confidence, (s)he should ask the Chief Minister to advise her/him to summon a session of the legislative assembly within a reasonable time. If the Chief Minister does not comply with the demand, the Governor will be within her/his rights to dismiss her/him. If, without giving the Chief Minister an opportunity to prove her/his majority, the Governor sacks her/him on the basis of a personal assessment, there may grow a constitutional crisis. This happened several times since 1959 when the first communist government in Kerala was dismissed on extraneous considerations.

Because of the discretionary power of the Governor, her/his personal equation with the Chief Minister is even more important than that between the President and her/his Prime Minister. A 1971 conference of the Governors recommended

that only men of high stature should be appointed as Governors, and it is desirable that the Union government consults the Chief Minister of a state before appointing a Governor. That does improve the state government to a certain extent, If, however, a council of ministers changes in the middle of a Governor' tenure, the equation may be upset.

The Bureaucracy

Each state government has its own secretariat, manned by personnel from the Indian Administrative Service, and headed by a chief secretary, the seniormost among them. Uttar Pradesh has a cabinet secretary without clearly defined status and powers. The administrative link between the headquarters and the districts—the real administrative unit—is constituted, in some states, by two layers of authorities and, in some by a single layer. A board of revenue, or an equivalent organization, or a body of financial commissioners is common. In some states, large or medium-sized, between the board and the districts there are divisions headed by divisional commissioners.

The State Legislature

There are unicameral legislatures in certain states and bi-cameral legislatures in others. Creation of a second chamber, or its abolition, is on sanction of Parliament provided that the state's legislative assembly passes a resolution to that effect by a majority of its total membership and two-thirds of the members present and voting. Membership of a legislative assembly varies between 500 and 30 elected from territorial constituencies of roughly same electoral strength. One member from the Anglo-Indian community may be nominated within this limit if, in the opinion of the Governor, that community is not adequately represented in the assembly. For the small states of Sikkim and Goa the minimum strength of the legislative assembly has been fixed at 30; for Mizoram the minimum

strength is 40. Although the Union territories of Delhi and Pondicherry have got legislatures, their strength is determined by law of Parliament. Seats in the legislative assemblies are reserved for the scheduled castes and scheduled tribes according to the population distribution in the state.

Right at the commencement of the constitution proportionality of the scheduled caste and scheduled tribe population to the total population of a state in respect of reservation of seats in the House of the People and the state legislatures in India for them was ordained by Articles 330(2) and 332(3) respectively. Similar proportionality was prescribed for the scheduled tribes of the autonomous districts of Assam with the total population of the state in respect of reservation of seats in the state legislature for the autonomous districts was ordained by Articles 330(3) and 332(4) respectively. Attainment of full statehood by Nagaland in 1963 and Meghalaya in 1972 terminated their scheduled tribes' claim to reservation *as* the scheduled tribes of the autonomous districts of Assam. They just got reservation in the general category of scheduled tribes.

In 1987, the year in which Arunachal Pradesh and Mizoram got full statehood, delimitation of constituencies was also frozen for all states of India, by the 57th amendment, till 2000. By the 84th amendment in 2001, this freezing was extended to after 2026—in effect, 2031, when census would be due. By the 57th amendment, the number of seats reserved for the scheduled tribes of Arunachal Pradesh, Meghalaya, Mizoram and Nagaland, all overwhelmingly tribal-majority hill states, were fixed in the following formula. If all the seats in the legislative assembly of such state in existence on the coming into force of the 57th amendment (1987) are held by the scheduled tribes, all seats except one would be reserved. In any other case, such number of seats as bears to the total number (as on the same date) of members belonging to the

scheduled tribes in the existing assembly bears to the total number of seats in the existing assembly. This proportionality was on the whole preserved for Tripura, which got a district council as late as in 1984, and Manipur, which had a vast tribal-majority hill area.

For Sikkim, there is an exception because of its ethnic composition and political history. Out of 30 seats in the legislative assembly of the state, 12 are reserved for the indigenous Sikkimese population of Bhotia and Lepcha origins, enjoying the status of scheduled tribes, one for the *sangha* (Tibetan Buddhist monasteries), and two for the scheduled castes [Section 5A of the Representation of the People Act, 1951, per Article 371F(f) of the constitution].

The Legislative Council

The total strength of the legislative council, where it exists, will not exceed two-thirds of the strength of the legislative assembly of a state and would not be less than 40. Of these members, as nearly as may be, one third will be elected from the local bodies, one twelfth by graduates or persons with equivalent qualification, determined by Parliament, of at least three years, one-twelfth by teachers of three years, one-third elected by members of the legislative assembly from non-members and the rest nominated by the Governors from persons having special knowledge or experience in the fields of literature, science, art, co-operative movement and social service. One-third of the members of the legislative council are replaced every two years so that, like the Council of States, it is a permanent body. The legislative assembly elects its Speaker and the Deputy Speaker and the legislative council, where it exists, elects both its Chairman and Deputy Chairman from among the members. Their emoluments and allowances, like those of the ministers and the ordinary legislators, are fixed by laws of the state legislatures. The chambers enjoy the same

powers, privileges and immunities as the Houses of Parliament. They are subject to the laws of disqualification, including the disqualification arising out of defection according to the tenth schedule, as the members of Parliament. The only difference lies in the replacement of the President by the Governor (Articles 191 and 192).

The legislative councils, where they exist, are much weaker than the legislative assemblies, compared with the status of the Council of States vis 'a vis the House of the People. The legislative assembly scores over the legislative council in holding the council of ministers responsible to it. Of course a bill has to be passed by both the chambers. The legislative council may initiate a non-money bill, but not a money bill. If a money bill, after being passed in the legislative assembly, is not liked by the legislative council, it may return the bill to the former with suggestions for amendments within 14 days or it will be taken as passed. The assembly may accept the amendment, on the other hand. Then the bill will be passed with the amendments. If a non-money bill originates in the legislative assembly, it may be rejected by the council or held up for three months or passed with amendments by the council. In any case the assembly can pass the bill, with or without the amendments suggested by the council in the same or the next session and transmit the bill again to the council. This time, if the council rejects the bill, or detains it for more than a month or passes the bill with amendments to which the assembly does not agree, it will be deemed to have been passed in the form the bill was passed for the second time by the assembly. Thus, amendments put up by the council to a bill passed by the assembly for the second time may bring the bill to the assembly for the third time, causing a total delay in the passage for four months; but it cannot stop the passage of the bill. There is no provision for joint sittings of the two chambers as in Parliament. On the other hand, a non-money bill originating in the

legislative council can be killed by the legislative assembly.

The language to be used in the legislature is the official language of the state or Hindi or English. The state legislature cannot discuss the conduct of a judge in the Supreme Court or a High Court, There is no question of demanding their removal. The courts, on their part, will not question the validity of legislative proceedings.

The Governor's Legislative Role

Like the President of India, the Governor is a part of the state legislature but not a member of any House. (S)he summons and prorogues the House(s) and dissolves the legislative assembly. (S)he addresses the House(s) at the beginning of the legislative assembly's term and at the beginning of the first session each year. (S)he may address the House(s) or send messages to the House(s) as often as (s)he finds it necessary. No money bill shall be moved in the assembly without her/his sanction. Her/his assent is necessary to any bill that has been passed by the House(s). And that is a critical power.

After a bill has been passed by the House(s) it will be presented to the Governor and the Governor shall declare either that (s)he assents to the bill or that (s)he withholds her/his assent therefrom or that (s)he reserves the bill for consideration of the President. The Governor may return a non-money bill to the legislature with suggestions for amendment. The House(s) will then have to reconsider the bill. After the bill is passed with or without the governor's suggestions being incorporated, the Governor has to give her/his assent. A bill thus passed for the second time cannot be vetoed or reserved for the President's consideration. Only a bill after its first passage through the legislature may be so reserved.

There is no time limit for any of these stages. So, there is scope for pocket veto. A Governor may, however, avoid direct

conflict with the legislature and the council of ministers by reserving a bill, not quite liked by her/him, for consideration of the President. There are instances of such bill being detained by the President for years. The question is: does the Governor reserve the bill on the advice of the council of ministers—an unlikely possibility—or in exercise of her/his discretion. It was, for the first time, in 1958 when the Governor reserved the Kerala Education Bill for the President's consideration. The Chief Minister, E.M.S. Namboodiripad, asked him on whose advice he had done so. The constitution does not grant him the discretion he had exercised. Next to proclamation of constitutional breakdown the issue of reservation of bills is the greatest irritant in the Union-state relations.

The 1971 conference of the Governors recommended that if, after an assembly election or at any other time, no party has a clear majority in the legislature, the Governor should order a Chief Minister to seek a vote of confidence. This measure will clearly reveal the extent of support that a council of ministers enjoys. The recommendation may produce a negative result if it is overused. If there is a split in a ruling coalition after it has won a vote of confidence is it the business of the Governor to order a floor test or the responsibility of the new opposition to move a vote of no confidence instead of running to the Governor to communicate the withdrawal of support? Coalitions are not covered by the anti-defection law and the Governor is under no obligation to order a floor test.

The Governor's Ordinances

When the state legislature is not in session, if necessary, the Governor issues ordinances. But, there are certain limitations on this power. Without instruction from the President the Governor shall not promulgate any ordinance if (a) a bill containing the same provisions would, under the constitution, have required the previous sanction of the President for its

introduction in the state legislature; or (b) (s)he would have deemed it necessary to reserve a bill containing the same provisions for the consideration of the President; or (c) an act of the state legislature containing the same provisions would have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

Every ordinance shall be laid before the state legislature and shall cease to operate at the expiration of six weeks from the reassembly, or if, before the expiration of the same period, a resolution disapproving it is passed by the legislature. The ordinance may be withdrawn by the Governor at any time. If and in so far as an ordinance under this article makes any provision which would not be valid if enacted as an act of the state legislature assented to by the Governor, it shall be void. Provided that, with regard to a matter enumerated in the concurrent list an ordinance, even repugnant to an existing parliamentary law, may be promulgated upon instruction from the President. Such ordinance shall be deemed to be an act of the state legislature which, after being reserved for the consideration of the President, has been assented to by her/him.

Constitutional Breakdown

The most controversial part of the Union-state relation in India, indeed the most controversial part of the constitution, is the provision relating to the declaration of constitutional breakdown in a state, treated, in the constitution, as an emergency. According to Article 356, if the President, on receipt of report from the Governor of a state or otherwise, is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the constitution, the President may, by proclamation,

(a) assume to himself all or any functions of the government of the state or any powers vested in or exercisable by the Governor or any body or authority in the state other than the legislature of the state;
(b) declare that the powers of the legislature of the state shall be exercisable by or under the authority of Parliament;
(c) make such other incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the proclamation including provisions for suspending in whole or part the operation of any provisions of the constitution relating to any body or authority in the state.

Provided that nothing in this clause shall authorize the President to assume to herself/himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this constitution relating to a High Court.

Any such proclamation may be revoked or varied by a subsequent proclamation. Every proclamation shall be laid before each House of Parliament and, except where it is a proclamation revoking a previous proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. In case the House of the People is dissolved or the dissolution of the House takes place during the said period of two months before approving the proclamation, and a resolution approving the proclamation has been passed by the council of states, then the proclamation will cease to operate at the expiration of 30 days from the date of the first sitting of the reconstituted House of the People. After a proclamation is approved, it will cease to operate after six months. The proclamation may be renewed every six months, but in no case shall it operate beyond three years.

Two additional qualifications to the permission for extension were added by the 44th amendment in 1978. In no case shall the proclamation extend beyond one year unless (a) a proclamation of emergency is in operation in the whole of India or in the state or in any of its part; and (b) the Election Commission certifies that the continuation in force of the proclamation is necessary on account of difficulties in holding election in the state. The proclamation may be renewed every six months, but in no case shall it operate beyond three years. Only in the case of Punjab was this 3-year limit crossed, due to militancy, in the 1980s and early 1990s – through amendments.

Four points need to be noted in this article. First, a constitutional breakdown is not mal-administration. Mal-administration is a highly subjective concept that cannot be juristically determined. Secondly, constitutional breakdown is not related to the dismissal of the council of ministers that has lost confidence of the legislative assembly. The President of India has the power to dismiss a council of ministers without causing a constitutional breakdown at the Union level. In 1967 Governor Dharma Vira dismissed the West Bengal council of ministers first. When the alternative council of ministers failed to gather majority support, a constitutional breakdown was declared. Thirdly, a constitutional breakdown may be declared on the report of the Governor *or otherwise*. Does the Governor send the report of a constitutional breakdown on the advice of the council of ministers? Obviously, that is impossible. Does (s)he have discretion in this respect? Not specifically. The oath to preserve, protect and defend the constitution comes in handy for the purpose of recommendation of President's rule, on the ground of constitutional breakdown. But there is a greater problem.

Even in the Constituent Assembly several members objected to the phrase 'or otherwise' as it gave unlimited option/means to the Union to declare a constitutional

breakdown. It could become necessary only if the Union lost confidence in the Governor, or the Governor was sloth and indulgent. In which case the Union should replace the Governor by one it can trust to be vigilant to do the necessary. But it is also possible that the oath of the Governor to preserve, protect and defend the constitution stood in the way of his reporting a constitutional breakdown. Depending on the clout of the Governor and the prevailing political configuration the Union government may also remove him. A Governor of Bihar (Nityananda Kanungo) was removed in this way in the 1970s, but a Governor of Tamil Nadu (Surjeet Singh Barnala) could not two decades later.

Related to this issue is the fourth issue of the fate of the state legislature on the promulgation of constitutional breakdown in a state. Article 356 does not *require* dissolution of the state legislature in the case of a proclamation of constitutional breakdown, though in most of the cases it was so done. It speaks of the exercise of powers of the state legislature by Parliament. It is quite possible that the Chief Minister, who, the Governor thinks, has lost majority, is actually enjoying the confidence of the House. The dismissal, in such case, will necessitate dissolution of the House too. That will be forcing a breakdown of the constitution violating people's right of representation. In the *S.R. Bommai and others v. the Union of India and others* case the Supreme Court, in 1994, ruled that, to avoid this undesirable situation, after a constitutional breakdown is declared, the legislative assembly should not be at once dissolved. It should be kept in suspended animation until the proclamation is ratified in Parliament to allow the council of ministers or an alternative one to forge a majority and revive the constitutional process. For the only legitimate test of the support to a council of ministers can be held on the floor of the House.

There will still remain a problem about the reasonableness

of the time allowed by the Governor to a Chief Minister in the summoning of a legislative assembly session to prove her/his majority in the legislative assembly. In 1967 in West Bengal, after a split in the second largest party in the united front government, the Governor, Dharma Vira, asked Chief Minister, Ajoy Mukherjee, to summon the legislative assembly on what Mukherjee considered to be a short notice. On Mukherjee's refusal the Governor sacked his council of ministers. The effort to build an alternative council of ministers having failed, a constitutional breakdown was declared. This story has been repeated in several states later. An additional factor complicating this muddle has been some governors' keenness to forestall horse trading of the legislators—a purely subjective one.

On the other hand, there is a clear constitutional mandate that, between two sessions of a House, not more than six months may elapse. Even if a council of ministers has been in office without a majority support in the legislative assembly, it cannot remain there for more than six months. Heavens will not fall during that period. Further, the keenness of a Governor to forestall a horse trading ignores the fact that the legislators do not need spoon feeding and, after all, they will eventually have to face the electorate.

There are three inter-related problems involved in floor test: the anti-defection law (tenth schedule), the role of the Speaker of the legislative assembly and the role of the judiciary. Following the ruling of Shiv Raj Patil, Speaker of the House of the People, in the early 1990s that a cumulative defection may validly constitute a split and would not attract disqualification under the then tenth schedule, in 1998, the Speaker of the Uttar Pradesh legislative assembly refused to disqualify members of the legislative assembly who defected in batches. The position became so precarious that the Supreme Court itself summoned the assembly to have a floor test. Although

the 91st amendment abolished the exemption of split from the anti-defection law, the Jharkhand Governor's keenness to forestall horse trading in his state after that resulted in such a public furore that the Supreme Court ordered a more severe floor test in that state, producing a major debate on the independence and privileges of the legislature. A somewhat similar situation in Bihar led to the Governor losing his job.

The Union Territories

The Union territories, created by the seventh amendment in 1956 following the recommendations of the states reorganization commission, are territorial units administered by regulations of the Union government through administrators, acting as its agents, with such designations which it may grant. Many of the erstwhile Union territories have been elevated to the status of states. Some have been granted legislative assemblies. As long as the assemblies function, regulations are not in operation. In case of dissolution/suspension of the legislative assemblies the regulations rule. Their autonomy depends on the discretion of the Union government within the framework of the constitution. But, of course, the regulations are to be within the framework of parliamentary acts and the administration of the Union territories is under parliamentary oversight.

Part VIII of the constitution, substituted by the seventh amendment to it, lays down the overall constitutional framework. The Union may appoint an administrator, by whatever name, for a Union territory. It may appoint a Governor of a neighbouring state or administrator of another Union territory as its administrator. No Union territory other than the NCT has a High Court. They are attached to High Courts of a neighbouring state.

None of the Union territories, except the National Capital Territory (NCT) of Delhi has the benefit of the seventh

schedule. Even the NCT's access to the seventh schedule is limited. According to Article 239AA(3)(a), subject to the provisions of this constitution, the legislative assembly of the NCT shall have power to make laws for the whole or any part of the territory with respect to any of the matters enumerated in the state list or in the concurrent list in so far as any such matter is applicable to the Union territories except matters with respect to entries 1 (public order), 2 (police) and 18 (land) of the state list and entries 64 (offences against laws with respect to any of the matters), 65 (jurisdiction and powers of courts, except the Supreme Court with respect to the matters) and 66 (fees in respect of any of the matters other than fees taken in any court) of that list in so far as they relate to the entries 1, 2 and 18. There is, at the same time, an overwhelming power of Parliament granted by sub-clause (b) of the same clause. Nothing in sub-clause (a) shall derogate from the powers of Parliament to make laws with respect to any matter for a Union territory or any part thereof. However, if a repugnant legislation of the assembly has obtained the assent of the President, on being reserved by the Lieutenant-Governor, it will be valid. The word 'a' implies that the stipulation is plenary for all Union territories,

Electoral laws about the state legislative assemblies will apply in the NCT. Parliament has retained the power to decide by law the power to fix the date on which the qualifying age of a voter (18 years) will be counted and to provide for the manner in which an election petition will be presented.

By whatever name are the administrators of the Union territories designated, they are members of the Union bureaucracy (in service or retired). They do not have substantive constitutional status. On the other hand, the constitution has provided for legislatures and council of ministers for the national capital territory of Delhi and for Pondicherry but with some difference.

The council of ministers of the NCT is appointed by the President and hold office during the pleasure of the President who has appointed the Lieutenant-Governor too. In case of any disagreement between the Lieutenant-Governor and the council of ministers of the NCT, therefore, the matter will be referred to the President and, in case of an interim urgency, the Lieutenant-Governor shall act as (s)he thinks fit. There is no requirement of reference of such disagreement to the Union government

The council of ministers of Pondicherry is appointed by the administrator (Lieutenant-Governor) and hold office during her/his pleasure. In Pondicherry there is no ministerial responsibility to the legislature. It is developing through convention. In the NCT it is a constitutional provision. The strength of the council of ministers in the NCT is, however, fixed at 10 per cent of that of its legislative assembly unlike in the states where it is 15 per cent. The case of Delhi may look like what is given by the right hand is taken back by the left hand. The fact is the power of the Lieutenant-Governor of Pondicherry is so real that the Union government does not need the additional power to appoint the ministers there.

The point is partly proved by the power of the Lieutenant-Governor of Pondicherry to promulgate, after obtaining instructions from the President, ordinances when the legislative assembly there is not in session. However, when the assembly is dissolved, or its operation is suspended, the Lieutenant-Governor cannot issue an ordinance. The Union territory then is under direct rule of the Union government [second proviso to Article 240(1)]. The Lieutenant-Governor of the NCT does not have the power. Ordinances for the NCT, if needed, will issue from the President of India. On the other hand, there is a provision for declaration of constitutional break down in the NCT that is absent in the case of Pondicherry.

Constitutionally, Delhi is closer to statehood than

Pondicherry. But it is in closer relation with the Union government than Pondicherry. The Lieutenant-Governor of Delhi, as a result, is weaker than the Lieutenant-Governor of Pondicherry, though the council of ministers and the legislature of Delhi are stronger than those institutions in Pondicherry.

XI

THE AUTONOMIES

Two kinds of autonomies were created in the Indian constitution to address the special problems at the time of Independence: (1) for Jammu and Kashmir, and (2) for the hill areas of the northeast India.

Jammu and Kashmir

One of the biggest princely states of pre-Independence India, Jammu and Kashmir was partly occupied by a Pakistan-backed invasion that has not yet been vacated. The Indian portion of the state was, temporarily, accorded the status of a Part B state with a special constitutional status embodied in Article 370 of the constitution.

According to sub-clause (c) of Clause (1) of Article 370, only two articles of the Indian constitution would apply to the state of Jammu and Kashmir: Article 1, which describes the territory of India, and Article 370 itself that describes the constitutional relation between the state and the Indian Union. According to sub-clause (b) of Clause (1) of Article 370, power of Parliament of India to make laws for Jammu and Kashmir is limited to (i) those matters in the Union list and the concurrent list which, in consultation with the government of the state, are declared by the President to correspond to matters specified in the instrument of accession governing the accession of the state to the dominion of India as the matters with respect to which the dominion legislature may make laws for that state;

and (ii) such other matters in the said list as, with the concurrence of the government of the state, the President may by order specify. According to sub-clause (d) of the same article, such of the other provisions of the constitution of India shall apply in relation to that state subject to such exceptions and modifications as the President may by order specify. It was provided that no such order which relates to the matters specified in the instrument of accession of the state shall be issued except in consultation with the government of the state. It was further provided that no such order which relates to matters other than those referred to in the preceding proviso shall be issued except with the concurrence of that government. According to Clause (2) of the article which further said: 'If the concurrence referred to in paragraph (ii) of the sub-clause (b) of Clause (1) or in the second proviso to sub-clause (d) of that Clause be given before the constituent assembly for the purpose of framing the constitution of the state is convened, it shall be placed before such assembly for such decision as it may take thereon.

An explanation attached to sub-clause (b) of Clause (1) of the article said that 'for the purpose of this article the government of the state means the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice of the council of ministers for the time being in office under the Maharaja's proclamation dated the fifth day of March 1948'. Although sub-cause (a) of Clause (1) of the article specifically ruled out the application of Article 238 that dealt with the government of the then Part B states (erstwhile princely states or groups of princely states), Article 366(21) declared the *maharaja* of the state as equivalent to *rajpramukhs* who were set up as heads of the Part B states. In December 1951, the constituent assembly of the state abolished the title of *maharaja* and elected *yuvaraj* (crown prince) Karan Singh, the erstwhile regent, the *sadr 'e riyasat*.

After the states reorganization of 1956 the post of *rajpramukh* was abolished throughout India. In 1965, in a radically different political situation, the Jammu and Kashmir state legislature changed the name and position of the *sadr `e riyasat* to Governor, to be appointed by the President of India.

Though the instruments of accession signed by the former princely states originally looked like treaties, by the time constitution making was complete, the former rulers agreed to be part of one Indian constitution. Only Jammu and Kashmir's instrument of accession was specially recognized in the Indian constitution and the constituent assembly of Jammu and Kashmir was allowed to frame a constitution of the state within the framework of the instrument of accession. As far as the Indian constitution is concerned, however, the relevant laws developed through the Constitution (Application to Jammu and Kashmir) Orders of 26 January 1950 and 14 May 1954, the last being based on an agreement, signed between Jawaharlal Nehru and Shaikh Abdullah at Delhi in June 1952 and ratified by the constituent assembly of Jammu and Kashmir.

The state's constituent assembly met on 5 November 1951 and functioned till 17 November 1956, its work being interrupted by the dismissal from the state's Prime Ministership and arrest in August 1953 of Shaikh Abdullah and the consequent political confusion. Yet its role in the evolution of the state's political structure and relation with India was significant. Abdullah's arrest did not substantially affect the presidential order of 1954. Subsequently, however, several amendments were made to that order causing allegations of the erosion of the state's autonomy. A part of the problem was structural. No constituent assembly can be perennial. After its work of constitution making is over, the constituent power, if simply transferred to the legislature with stipulation of a special procedure. Even a treaty keeps provision for future amendments of its terms, unless, of course, it is temporary in

nature. Article 370 did not keep any provision for amendment of the terms of the state's relations in matters outside the instrument of accession after the constituent assembly would wind up. No fresh formula was evolved for such amendment when the constituent assembly of the state was active.

Under the constitution of Jammu and Kashmir, the head of the state government was called *sadr 'e riyasat;* and he was to be elected by the local legislative assembly. By an amendment of the state's constitution in 1965 by the state assembly, the post was called 'Governor'. The Governor was now to be appointed by the President of India and would hold office for five years. By successive orders of the President (in consultation with the state government) Parliament's power, especially in respect of security and foreign trade were enhanced.

Still the state retains a great deal of the original autonomy. In the first place, Parliament cannot increase or diminish the territory of the state, change its territorial boundaries or alter its name without the consent of the state legislature. In the second place, right to equality of opportunity of all Indian citizens in respect of public employment in the state was dropped. For 25 years from the commencement of the order, the freedom of thought and expression was restricted by the consideration of the security of the state. Thirdly, determination of reasonableness of the restrictions of the freedoms was left to the appropriate legislature (seeking to limit the scope of judicial review of such restriction). Fourthly, the power of Parliament over preventive detention legislation was transferred to the state legislature.

The state retained the power to levy any tax or penalty, legislate for the promotion of public life or the prevention of danger to life and property or with respect to property declared by law to be evacuee property. It has a quite extended definition of estate. Parliament's power to confer additional power to the

Supreme Court in respect to constitutional remedies beyond what is sanctioned by Article 32 was denied. The state retained its autonomy in respect of preventive detention law. The state asserted its right to define the permanent citizens and decide upon their rights. For the purposes of election of the President of India, the population of the state will be deemed to be 63,00,000. The state shall have six members in the House of the People, and the territorial constituencies for elections will not include the area under Pakistan's occupation. Parliament's power to confer additional powers on the Supreme Court in criminal trial would, with reference to Jammu and Kashmir, be subject to the request of the state legislature. The state High Court's certification for appeal to the Supreme Court of India against its judgements was dropped though the Supreme Court was given the power to grant special leave of appeal.

The entire structure of the state government in Jammu and Kashmir was independent of the constitution of India. Parts VI, VIII, IX of the latter were, therefore, dropped. The powers of the state's legislature were made larger than those of other states by (1) dropping the entire state list of the seventh schedule, (2) delimiting the application of the concurrent list, but (3) retaining the residuary powers with the Union. The scope for internal emergency was made subject to the request or concurrence to the Jammu and Kashmir legislature. The scope for financial emergency was deleted. Amendment to the Indian constitution shall have effect on the state only under the President's certificate after consultation with the state government. No amendment to the state's constitution will, however, be possible without the assent of the President of India. The constitutional arrangement of Jammu and Kashmir is the only element of the treaty theory behind a federation.

There is one final twist in the tale. Article 370 has the heading: 'Temporary provisions with respect to the state of Jammu and Kashmir'. This should mean that, in the long run,

the article will cease to exist. Clause (3) of the same article, however, lays down that the President of India, after consulting the constituent assembly of Jammu and Kashmir, may declare that 'the article' ceases to exist. The constituent assembly of the state wound up in 1956. And no 'government' of the state can risk public wrath by agreeing to the abolition of the state's special status. The President of India cannot, therefore, declare its termination. It has become practically permanent. The title of the article, along with the heading of the part (XXI), may, however, be changed by dropping the word 'temporary" through amendment of the Indian constitution under Article 368.

The Tribal Belts

The tribal people constitute roughly 8 per cent of the Indian population. Traditionally they live in compact areas. Their concentration is found mostly in the central India and northeast India, the latter more sequestered than the former. Consequently, over the past centuries, the tribal belts in central India have seen the penetration of non-tribal outsiders in their home land, while the hill areas of northeast India have retained a considerable part of their pristine culture and rights over land. To administer them, the British developed the system of excluded administration by which their settled areas were, either wholly or partially, excluded from the authority of the popular legislature and denied representation to them.

States Reorganization and Northeast India

Under the constitution of India two different patterns of administration were set up under Article 244. Most of the hitherto excluded and partially excluded areas outside Assam were given the fifth schedule under which tribes advisory councils were set up with not less than 20 members, wholly or partly consisting of legislative assembly members from the tribes

living therein, the vacancies being filled up by other members of those tribes to advise on matters pertaining to the welfare and advancement of the scheduled tribes in the state referred to them by the Governor. The council of ministers in Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh and Orissa, having large numbers of tribal population, are mandated to include one minister for tribal affairs.

Under the Government of India Act, 1935, the region that is called northeast India today comprised the British province of Assam, two princely states of Manipur and Tripura, twenty-five nominally independent chiefships in the Khasi hills (now in Meghalaya) and a 'tribal area' outside British India, but inside India and under the executive authority of the Governor-General of British India. Under the constitution (1950), all the hitherto excluded and partially excluded areas in Assam were called 'tribal areas' (distinct from the tribal areas under the Government of India, 1935) and brought under the sixth schedule which divided them into two parts. Most of the hill areas were put in Part A and were given autonomous district councils and regional councils to look after the local government affairs, land, unreserved forests, minerals and customary rights and practices of the local people, and trading and money-lending activities of the non-tribal people. They were given power of taxation and to set up district and regional funds. Provision of grant-in-aid from the Union fund was made in the constitution. And the accounts are to be audited by the Comptroller and Auditor-General of India. No Act of Parliament or state legislature applies, wholly or with modification, to any autonomous district unless the Governor of the state by public notification so directs. The state government may temporarily take over the functions of a district/regional council if, in its opinion, the council cannot be run according to the provisions of the sixth schedule. In Part B were put the hitherto unadministered Naga tribal area

and the virtually unadministered north eastern frontier tracts, to be administered by the President of India through the Governor of Assam as his agent. The autonomous district council never came into being in the Naga hills because of secessionist violence.

Political changes in several parts of India required amendments of the constitution. The reorganization of states in 1956 led to the setting up of regional development organizations in Andhra Pradesh, Punjab and Bombay states in 1956 (revised Article 371). Subsequently, Punjab and Bombay were bifurcated and Andhra Pradesh had a regional reorganization. Separate development boards were provided for Vidarbha and Marathawada in Maharashtra and Saurashtra and Kutch in Gujarat (Article 371) and for equal opportunities for regions in Andhra Pradesh (Article 371D). In 1963, Nagaland was created by uniting the Naga hills district of Assam and the Naga tribal area, with the Governor being vested with special responsibility for law and order in the state. No parliamentary Act about religious or social practices of the Nagas, Naga customary law and procedure, administration of civil and criminal justice involving decisions according to Naga customary law and ownership and transfer of land and its resources shall apply to Nagaland unless the state legislature by resolution so decides. Three more states were later carved out of Assam: Arunachal Pradesh, Meghalaya and Mizoram. The Union territories of Manipur and Tripura were uplifted to statehood status. The Governor of Arunachal Pradesh was given special responsibility for law and order (Article 371H). Provision was made for a committee of the legislative assembly of Manipur, consisting of members from the hill areas of the state, for the modifications to be made to the rules of business of government and rules of procedure of the legislative assembly of the state and for any special responsibility of the Governor in order to secure proper functioning of such committee.

The promotion of the Mizo hills autonomous district to statehood was accompanied by abolition of the Mizo hills district council and creation of three autonomous districts of Mara, Lai and Chakma out of the erstwhile Pawi-Lakher regional council on its southern territory. But the state of Mizoram retained the traditional protection of the autonomous district. No act of Parliament, passed after 1957, in respect of religious or social practices of the Mizos, their customary law and procedure, administration of civil and criminal justice involving decisions according to Mizo customary law and ownership and transfer of land shall apply to the state of Mizoram unless the legislative assembly of the state by a resolution so decides. Tripura had, meanwhile, got an autonomous tribal areas district comprising scattered tribal-dominated villages and groups of villages. The Tripura tribal areas district is not an administrative district; it is a political district. In Assam a Bodoland territorial areas district, in a similar fashion, was created with scattered villages along the north bank of the Brahmaputra river, and it was acknowledged in the 90th amendment of the constitution in 2003. Assam enlarged developmental functions of the remaining two autonomous district councils of North Cachar and Karbi-Anglong within it.

The *panchayat* system under the eleventh schedule does not apply to the areas under the fifth schedule, the states of Nagaland, Meghalaya and Mizoram, and the hill areas of Manipur. Nor does the eleventh schedule, relating to the district-level *panchayat*, apply to the hill areas of Darjeeing district of West Bengal. In the Indian constitutional format, autonomy is a larger concept than local government.

XII

THE JUDICIARY

Political philosophy began in ancient Greece with the *polity's* (state's) quest for justice. The ancient Greeks believed the state to be the deliverer of justice. They did not separate magistracy from adjudication. Indeed, the separation did not take place until the emergence of the constitutionalist theory of separation of powers in the eighteenth century. The first country to institutionalize this separation was the USA. Article 3 of the US constitution vested the judicial power of the federation in the Supreme Court and in such inferior courts as the congress, from time to time, may establish. In monarchical England, in contrast, the Queen is still the source of justice and the judicial committee of the House of Lords the highest court in the country.

Partly because the USA has two sets of constitution, the state judiciaries are different from the federal judiciary. There is no appeal from a state court to a federal court, and *vice versa*. In India the judiciary is one hierarchical, integrated structure headed by the Supreme Court. Parliament, by law, determines the number of judges in the Supreme Court. At present there is one Chief Justice of India (CJI) and not more than 25 other judges. Each state, usually, has a High Court of its own. Some, however, have common High Courts among them, like the Gauhati High Court that has jurisdiction over Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura, and the Bombay High Court that has

jurisdiction on Maharashtra, Goa, Dadra and Nagar Haveli, and Daman and Diu. Some of the High Courts have more than one bench.

The Judges

The President, in consultation with the judges of the Supreme Court and such judges of state High Courts as (s)he thinks necessary, appoints the judges of the Supreme Court under her/his hand and seal. For appointment of all judges other than the CJI, consultation with the Chief Justice is a must. When the CJI is unable to perform his duties President shall assign those duties to another judge of the Supreme Court. If at any time there should not be a quorum of the judges of the Supreme Court to hold or continue any session of the court, the CJI, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, may request in writing the attendance of a High Court judge, duly qualified to be a Supreme Court judge, to attend the Supreme Court as an *ad hoc* judge. The CJI may also, with the previous consent of the President, request a retired judge of the Supreme Court or a retired judge of a High Court duly qualified to be a judge of the Supreme Court to attend the court with the status of a Supreme Court judge. A somewhat similar procedure of appointment of judges of the state High Courts, the second rung of the judiciary, has been prescribed with the specific requirement to consult the Governor of the state and the Chief Justice of the state's High Court.

High levels of efficiency and integrity are expected of the judges. A person shall not be qualified for appointment as a judge of the Supreme Court unless (s)he is a citizen of India and (a) has been for at least five years a judge of one or more High Courts in succession, or (b) has been for at least ten years an advocate of one or more High Courts in succession,

or (c) is, in the opinion of the President, a distinguished jurist. No person shall be qualified to be appointed as a judge in a High Court unless (s)he has, for at least ten years, held a judicial office in the territory of India, or (b) has for at least ten years been an advocate of one or more High Courts in succession.

Judges of the subordinate courts are, in the bulk, appointed in the judicial service through the state Public Service Commission. But a district judge is so appointed by the Governor in consultation with the Chief Justice of the state's High Court. In case of the absence of the Chief Justice of a High Court, President makes arrangement for some other judge of the court to discharge his duties. In case of a rise in the work of a High Court, the President may appoint a duly qualified person as an additional judge for not more than two years. Taking the previous consent of the President, the Chief Justice may request a retired judge of the same court or any other court to sit and act as a judge in the court with the status of a High Court judge.

Judges in the two levels of court take similar oaths to bear true faith and allegiance to the constitution, to uphold the sovereignty and integrity of India, to duly and faithfully and to the best of their ability, knowledge and judgment perform the duties of their office without fear or favour, affection or ill-will and to uphold the constitution and the laws. The special importance of this oath lies in its commitment to upholding the constitution and the laws of the country. It gives the judges of the Supreme Court and the High Courts the power to act as the guardian of the constitution and the laws.

A Supreme Court judge holds office until (s)he attains the age of sixty five years. (S)he may resign office by writing under her/his hand to the President. (S)he may be removed by the President after an address by both the Houses of Parliament by a majority of the total members of each House and a majority

of at least two-thirds of the members present and voting in each on the ground of proved misbehaviour or incapacity. 'Proved misbehaviour', naturally implies investigation. Parliament, by law, may regulate the procedure for presentation of the address and for the investigation and proof of such misbehaviour or incapacity. The maximum age of a High Court judge is 62 years. (S)he may resign or be removed by the same way of address to the President as prescribed for the Supreme Court judges. The state legislatures have no role in it. A High Court judge may also be promoted to the Supreme Court. No judge of the Supreme Court may practise as an advocate in any Indian court after retirement. The judges of the High Courts may practise in the Supreme Court or other High Courts after serving a High Court. The High Courts superintend the subordinate courts but are themselves autonomous of the Supreme Court in internal administration.

Jurisdiction of the Supreme Court

The Supreme Court sits in Delhi but may sit in other place(s) as the CJI, with the approval of the President, may appoint. The Supreme Court has three jurisdictions: original, appellate and advisory. The High Courts and the district courts have no advisory jurisdiction. The law declared by the Supreme Court is binding on all courts within the territory of India. This power, of course, covers the advisory opinion given by the Supreme Court upon reference from the President; but it may not bind the President. All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court. The Supreme Court is a court of records—a court where the acts and judicial proceedings are enrolled for a perpetual memory and testimony—and has contempt power (to fine and imprison an offender of its dignity and authority).

The Supreme Court has original jurisdiction in any dispute (a) between the governments of India and one or more states;

or (b) between the governments of India and any state or states on one side and one or more states on the other; or (c) between two or more states, if and in so far as the dispute involves any question of law or fact on which the existence or extent of a legal right depends. This jurisdiction shall not extend to a dispute arising out of any treaty, engagement, *sanad* (charter) or other similar instrument which, having been entered into or executed before the commencement of the constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute. The point to note here is the absence of individuals within the scope of the article (131). Individuals or non-state groups of individuals approach the Supreme Court, under Article 32, for constitutional remedies, both originally and on appeal from a High Court, and under Article 142 which grants plenary power to the Supreme Court for enforcement of its decrees and orders as is necessary 'for doing complete justice in any cause or matter pending before it', and any decree so passed or order so made is enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe. In 1954, the President passed the Supreme Court (Decrees and Orders) Enforcement Order. Article 142 has been liberally interpreted by the Supreme Court to enable itself to go into not only ordinary legal rights but any administrative irregularity and miscarriage of justice. The Supreme Court has dealt with all kinds of cases including pollution of the Ganga, guidelines for adoption of Indian children by foreigners, forced prostitution of *devadasis* (temple servants/dancers), starvation deaths in the Kalahandi district of Orissa, dignity of women in workplace, the government using discretion in allotting government accommodation to non-officials, former members of Parliament, and former ministers, allotment of petrol pumps

and methods of investigation by the CBI into cases of corruption bringing upon itself the allegation of judicial activism/overdrive.

The Supreme Court's appellate jurisdiction is three-fold: constitutional, civil and criminal. Under its appellate jurisdiction, the Supreme Court takes up appeals from the High Courts in civil, criminal or other proceedings if the High Court certifies that a civil dispute involves a substantial question of law of general importance. Even without such certification by a High Court an appeal shall lie to the Supreme Court from any judgement, final order or sentence in a criminal proceeding of a High Court if the High Court (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or (b) has withdrawn from trial before itself any case from any court subordinate to its authority and in such trial convicted the accused person and sentenced him to death; or (c) certifies that the case is fit for appeal to the Supreme Court. The Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any case or matter passed or made by any court or tribunal in the territory of India other than a court or tribunal constituted by or under any law relating to the armed forces. It has power to review its own judgement.

Under Article 143, the President may consult the Supreme Court on any question of law or fact. There is, as already mentioned, no binding force of such advice, as far as the President is concerned, though it has some moral force paradoxically enabling the Union government to pass some of its political responsibilities.

Jurisdiction of the High Courts

Subject to the provisions of the constitution and laws of the appropriate legislature, the jurisdiction of, and the law administered in any existing High Court and the respective

powers of the judges are the same as immediately before the commencement of the constitution. The constitution has removed the restrictions upon their jurisdiction as to revenue matters that existed prior to the commencement of the constitution. The existing jurisdiction of the High Courts are governed by the letters patent of the colonial period and central and state acts, particularly, the codes of civil and criminal procedure – of course colonial legacies, but under continuous review. The entire judicial structure, except the Supreme Court and the quasi-judicial administrative tribunals, is inherited from the colonial days, with suitable modifications. Thus, in the presidency towns of Calcutta, Bombay and Madras there was original jurisdiction of the High Courts in civil and criminal cases arising within the respective towns. The original criminal jurisdiction has been entirely taken away, and, although city civil courts have been set up in the cities, the High Courts still retain original jurisdiction in civil cases of higher value. The bulk of the cases dealt with by the High Courts are on the appellate side, both civil and criminal.

Like the Supreme Court, the High Courts are courts of record and have contempt jurisdiction. The High Courts have wide-ranging powers of judicial and administrative supervision over all courts within their territorial jurisdictions including the administrative tribunals. Administrative tribunals are semi-judicial bodies and their superintendence by the High Courts has been interpreted as both judicial and administrative. A critical extraordinary jurisdiction that the High Courts share with the Supreme Court is the power to issue directions, orders or writs (including the writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*) to any person or authority, including any government, within those territories (Article 226). This article combines the effects of Articles 32 and 142 in the High Courts. There is, however, no *right* granted to a person to approach the High Court for such action as in

the case of the Supreme Court under Article 32 of the constitution. But the writ jurisdiction of the High Court is larger than that of the Supreme Court. While the Supreme Court, under Article 32, can issue the writs only when the fundamental rights have been infringed, the High Court can issue them not only in cases of infringement of fundamental rights but also for any other purpose.

The appellate jurisdiction of the High Courts covers both civil and criminal cases. On the civil side, in first appeal, it hears cases from courts of district judges and, in cases of higher value, from the subordinate judges. In second appeal, it hears cases decided by district judges on appeal from subordinate judges only when they involve questions of law and procedure. Under letters patent, the High Courts of Allahabad, Bombay, Calcutta, Madras and Patna hear appeals against judgements of their own single judges. On the criminal side, it hears appeal against judgements of sessions judges and assistant sessions judges awarding imprisonment of over seven years. It also hears appeals against judgements of assistant sessions judges, metropolitan magistrates and other judicial magistrates in cases involving other than petty crimes.

The Subordinate Courts

The High Courts have administrative control over subordinate courts in the following ways. The High Courts are consulted by the Governor in matters of appointment, posting and promotion of district judges. The only condition attached to this is that a person not already in the service of the Union or a state may be appointed a district judge only if (s)he has been an advocate or pleader for not less than seven years. Along with the state public service commission, the High Courts are consulted in appointment to judicial services lower than the district courts. The control over the district and subordinate courts, including posting and promotion of, and grant of leave

to, judicial service officers below the rank of district judges is vested in the High Courts. At the lowest stage civil and criminal courts are separate.

Ever since the report of the first law commission, creation of an All-India Judicial Service (AIJS) on the pattern of the All-India Civil Services, for district judges, has been on the agenda of the government. The opposition came mostly from the High Courts that apprehended loss of power. The 42nd amendment to the constitution (Article 312) envisaged the creation of AIJS. In its 15th report, the parliamentary standing committee on law and justice recommended its creation and directed the law ministry to take immediate steps for setting up such a service. The Supreme Court is not averse to the idea. In two of its judgments, in 1991 and 1993, it had recommended setting up of an AIJS. As of now, while most government departments have all-India service recruits, selected after an all-India competitive examination conducted by the Union Public Service Commission every year, the judiciary is the only all-India set-up that does not have an all-India selection process, though there are state judicial services for sub-district courts.

Judicial Review

In a broad sense, judicial review refers to examination and, if necessary, invalidation of any governmental action and legislation. In a narrower sense, it refers to corrective, or nullifying, action on legislation while judicial actions on executive decisions come through writs. In the common law practice this second function belongs to the domain of tort.

Theoretically, judicial review springs from two sources: supremacy of the constitution and the power of the judiciary to interpret law, including constitutional law. The US Constitution gives a clear direction to this effect in Article VI, Section 2:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding

It is sometimes alleged that judicial review is an invention of the US Supreme Court and, in fact, an invasion on the US Congress. In fact, the idea was developed by Alexander Hamilton in the *Federalist Paper no. 67* where he wrote:

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamentai law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

It should be noted that the supremacy of the US constitution was initially asserted vis 'a vis the constitutions of the federated states. It should also be noted that judicial review emerged in the *Marbury v. Madison* case (1803) in course of self-denial of the US Supreme Court rather than an aggressive move against the US congress. The court declared a part of Section 13 of the Judiciary Act of 1789 void as it extended the original jurisdiction of Supreme Court beyond what had been sanctioned by the constitution.

Strictly speaking, therefore, judicial review emerged out of the Supreme Court's refusal to assume more powers than had been sanctioned by the constitution. It does not mean

judicial supremacy, and its opposite is not supremacy of parliament. The opposite of judicial review is eminent domain which, according to the same judge in *McCulloch v. Maryland* (1819), just allows the government to work in its assigned field. Reiterating that the constitution and the laws made in pursuance thereof are supreme, and cannot be controlled by the states, Marshall wrote:

> The powers of the government are limited, and its powers are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people but the end be legitimate. Let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the constitution, are constitutional.

This sobre view of judicial review guided Chief Justice Marshall all through even though he worked for the strengthening of the Union. Until 1870 there was only one more case of judicial review. After the civil war, however, US politics became intense and contentious. Between 1870 and 1920 the US Supreme Court invalidated as many as 39 congressional acts and several state legislations. During the new deal period, judicial review in the USA became so contentious that Chief Justice Frankfurter advised B.N. Rao, constitutional advisor to the Constituent Assembly of India, against adopting the phrase 'due process of law' as a guarantee for property and personal liberty. On the merit of judicial review the Constituent Assembly of India was sharply divided. B.R. Ambedkar, chairman of the Drafting Committee, put his dilemma in the following words:

> I can not altogether omit the possibility of a legislature packed by party men making laws which may abrogate or violate what we regard as certain fundamental principles. At the same time, I do not see how five or six gentlemen sitting in the Federal or Supreme Court ... be trusted to determine which law is good and which law is bad.

Nowhere in the constitution of India is there a categorical statement that the constitution is the supreme law of the land. It was not necessary because the constitution of India is a single document. But the hint is strewn all over the body of the constitution in the numerous occurrences of the phrase 'subject to the provisions of the constitution.' The problem lies in the source of authority to interpret the constitution, both in the USA and in India. When Hamilton declared that interpretation of laws is a function of the courts, he was merely reiterating the common law practice. Article VI, Section 2 of the US constitution merely binds the judges to the constitution. Article 141 of the Indian constitution, likewise, states that the law determined by the Supreme Court shall be binding on all courts. Negatively, this gives the judges an authority over the laws. Unless the courts acknowledge the validity of a law, it can be violated with impunity, and it will not operate. Positively, however, although the constitution of India speaks of reasonable restrictions on various fundamental rights of the people, and in the USA they are assumed to exist, neither constitution expressly vests the power to interpret the reasonableness of law in the judiciary. This left the scope for contending claims of the judiciary and the legislature in both the countries to the authority to interpret the constitution. Of the three constitutional organs of the Indian (as well as the US) polity, the judiciary has commanded the highest amount of respect primarily because of the high quality of its members and its political neutrality. As an organ of power, however, it is

bound to evoke controversy at one time or another.

That came shortly after the commencement of the constitution of India, in the *A.K. Gopalan v. the state of Madras* case in 1951, when the Supreme Court proclaimed that, in the Indian constitution, judicial review exists. The court, in fact, declared a part of the old preventive detention law invalid. The various limitations of reasonableness on power of the state were the source of this judicial authority. *Gopalan's* was a political case involving the question of personal liberty. But the authority was expressed also in the field of economic policy when a number of land reform legislations were declared void on ground of their conflict with the right to property as enshrined in Article 31 of the constitution. This was the main reason behind the first amendment in 1951 to protect land reform legislations against judicial review by Article 31A and set up the ninth schedule to the constitution specifically immunizing certain state laws by Article 31B. In the first urge for establishing a socialistic pattern of society, the fourth amendment in 1955 expanded the ninth schedule to cover some non-agricultural property. The 17th amendment in 1964 amended the definition of 'estate' to cover *ryotwari* lands too and greatly expanded the scope of the ninth schedule. This produced a challenge in the Supreme Court which, in the *Golak Nath v. the state of Punjab* (1967), declared that fundamental rights cannot be amended due to the facts that (1) Article 13(2) forbids the passing of a law impinging upon any of the rights granted in Part III of the constitution, that (2) in the Indian constitution amendment is law as, unlike in the US constitution, in the Indian constitution an amendment requires the assent of the President, and that (3) Article 368 of the constitution, as it then existed, merely described the procedure of amendment and did not confer on Parliament the power to amend the constitution. This judgement reversed the judgements in the *Shankari Prasad v. the Union of India*

case of 1951 and the *Sajjan Singh v. the Union of India* case of 1965, and laid down that Parliament has constituent power to amend any part of the constitution by following the procedure prescribed in Article 368.

It is possible to argue that the *Golak Nath* judgement was the result of a stiffening of judicial attitude at the legislature successively and successfully trying to subvert the judgements of the Supreme Court. The final provocation came with the twentieth amendment in December 1966. The objective of the twentieth amendment that over-ruled some judicial decisions of the Supreme Court and some other courts was as follows:

> Appointment of district judges in Uttar Pradesh and a few other states have been rendered invalid and illegal by a recent judgement of the Supreme Court on the ground that such appointments were not made in accordance with the provisions of Article 233 of the Constitution. In another judgement, the Supreme Court had held that the power of posting of a district judge under Article 233 does not include the power of transfer of such judge from one station to another and that the power of transfer of a district judge is vested in the High Court under Article 235 of the Constitution. As a result of these judgements, a serious situation has arisen because doubt has been thrown on the validity of the judgements, decrees, orders and sentences passed or made by these district judges and a number of writ petitions and other cases have already been filed challenging their validity. The functioning of the district courts in Uttar Pradesh has practically come to a standstill. It is, therefore, urgently necessary to validate the judgments, decrees, orders and sentences passed or made heretofore by all such district judges in those states and also to validate the appointment, posting, promotion and transfer of such district judges barring those few who were not eligible for appointment under Article 233.

Golaknath unleashed a legislature versus judiciary debate on their respective democratic credentials. A debate on class bias of the judges started along with it. The 24th amendment in 1971 inserted several clauses to declare that all parts of the constitution are amendable and to ensure the President's obligation to give assent to an amendment bill (thus making the amendment process in India different from the earlier one). The 25th amendment in 1972 laid down that no law which declared that it was for giving effect to the directive principles of state policy would be called in question in any court on the ground that it does not give effect to such policy. This was, clearly, a limitation on judicial review and, in the *Keshavananda v. the state of Kerala* case in 1973, the Supreme Court declared it void. Such a thing never happened in the cradle of judicial review, namely, the USA. But, then, the US congress never tried to directly circumvent judicial review. During the new deal debate President Franklin Roosevelt merely threatened the US Supreme Court to pack it with new judges. It worked and the Supreme Court bent.

The worst example of legislative shortsightedness is the single-item insertion of the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) Act, 1993, in the ninth schedule by a single item amendment—the 76th—in 1994 on the demand of the then Tamil Nadu government. The Supreme Court, after *Golak Nath*, had adopted a condescending attitude to land reform legislations and, by extension, to property right-related legislations being included in the ninth schedule. This particular insertion had, by no stretch of imagination, a link with the kind of legislations hitherto inserted. The resulting challenge led to the judgement in the *Coelho* case in January 2007 jeopardizing all the insertions since the *Keshavananda* judgement of 1973. In this judgement the Supreme Court ruled

that all such legislations are subject to judicial review in the light of the basic structure doctrine that was enunciated in *Keshavananda*.

Haste, *ad hocism*, arrogance and lack of far sight appear to have led to occasional positioning of the legislature and the judiciary in the country. Occasionally, Supreme Court judges have spoken of understanding and compromise while leading legislators have vouched their high regard for the judiciary. This balance has, however, not always been demonstrated in the judiciary-legislature face-off.

Basic Features/Structure

A critical doctrine emerged out of the *Keshavananda* case—the doctrine of basic features of the constitution. Occasionally, it is called the basic structure of the constitution. This second phrase is erroneous as the constitution itself is the basic structure of a polity. There cannot be a basic structure within a basic structure. The Supreme Court reversed the decision in the *Golak Nath* case and held that all parts of the constitution, including Part III embodying the fundamental rights, may be amended. It simultaneously held that the basic features of the constitution may not be amended. These basic features were not identified at a time. The court reserved to itself the right to identify them as occasions arise. Besides judicial review, separation of power, independence of the judiciary, secularism and parliamentary democracy have, gradually, been identified as some of the basic features so far. Right to property is not one of them. This enabled the deletion of the right to freedom of property [Article 19(1) (f)] in Part III of the constitution and the removal of the right to property (Article 31) from the part to a separate part (Part XII, chapter IV) as Article 300A, making it a constitutional right.

In the United Kingdom, judicial review operates on executive action (tort), and not legislation. In the USA it

operates on legislations. No specific authorization of the judiciary is available in this regard. When the Supreme Court of India proclaimed the doctrine of basic features the *basis* of confrontation over amendment was mostly removed. This does not mean the end of judicial review in general and judicial review of amendments in particular. Following *Keshavananda* the Supreme Court, apparently, shifted its attention to personal and political freedoms though there is no evidence of its standing against the excesses of the 1975 emergency. In fact, the *ADM Jabalpur v. Shukla* case of 1976 has earned some notoriety by denying the relief of *habeas corpus* to detainees under the Maintenance of Internal Security Act, within three years of the *Keshavananda* judgement, as the internal emergency of June 1975 had suspended Article 21. Two of the majority of the judges were later associated with the evolution of a libertarian trend in the Supreme Court in subsequent years. For the time being, however, only one of the five distinguished judges, H.R. Khanna, disagreed. He was superseded in the appointment of the next CJI.

It was in the post-emergency period that the new wind started blowing, resulting in great advance in humanitarian jurisprudence beginning with the assertion of the intangible aspect of the rights to equality (Article 14) and to freedom (Articles 19 and 21) in the case of *Maneka Gandhi v. the Union of India* (1978). The court did not call these articles 'basic features', because of the *Keshavananda* ruling that fundamental rights are amendable, but it called Article 14 'the founding faith' of our democratic republic—a guarantee against arbitrary rule and set high value by Articles 19 and 21. Creation of the system of public interest litigation (PIL) brought about an entirely radical development in legal equality (Article 14) by making justice available to the poor and needy. The trend has continued since then.

Public Interest Litigation and Judicial Activism

Development of public interest litigation (PIL) partly set aside the earlier doctrine of *locus standi* in case public interest was involved. Even a private letter addressed to the court was considered admissible. Public interest litigation touched labour problems, human rights, sexual harassment of women at work places, custodial death and environmental issues. In a number of judgements since 1990, the Supreme Court has laid down that a PIL will not be entertained unless a fundamental right has been affected. But the concept of fundamental rights itself has been ever expansive. Thus, right to freedom of speech and expression [Article 19(1)] has been held to be the source of right to information. Right to life under Article 21 has been interpreted to mean the right to a safe and dignified life. This expansive mode of interpretation of the right to life has greatly helped the common people in matters of health, education and labour laws.

At the same time, it has led to the encroachment of judiciary into the domain of administrative policy. Closure of polluting industries, for example, has created unemployment and closure of unorganized industries has produced the same result which government has been forced to handle. Sealing of unauthorized buildings in big urban centres that have grown over decades, largely with official connivance, if not indulgence, has produced enormous problems of law and order so much so that administrations have found such order unimplementable. It has divided the judicial community too, with senior retired judges issuing warnings against judicial overreach. On 10 December 2007, a two-judge bench of the Supreme Court disapproved of judicial intrusion upon the executive and legislative domain. Within a few days, on 13 December, a three-judge bench, headed by the CJI, announced that it was not bound by that ruling.

It is possible, even desirable, to make a distinction between

judicial review and judicial activism in a technical sense. Judicial review, as practised since the *Marbury v. Madison* case in the US Supreme Court two centuries ago, is a negative function intended to protect the rights of the citizens and the federated states from unauthorized intrusion upon their rights. Judicial activism is a positive function of directing the state to do its duty. Whereas in India judicial review flows directly from Article 13 of the constitution, judicial activism takes the course of writs (Article 32 or 226), usually, *mandamus*. There cannot be a mandamus on the legislature. It will apply only on the executive and its administrative branches.

The Courts and Legislative Privilege

The judiciary-legislature face-off actually appeared first in the *Keshav Singh* case of 1964 in Uttar Pradesh calling for a presidential reference to the Supreme Court for opinion. The opinion on *Keshav Singh* established merely that the judges had the right to entertain an appeal against punishment resulting from legislative privilege and issue a writ of *habeas corpus*. It did not altogether deny the legislature the power to punish on the strength of privilege. Subsequently, in March 1965, the Allahabad High Court decided that the legislature had the right to award the punishment for contempt. This opinion of the Supreme Court, therefore, is of a very limited value. It only asserted for itself the power of judicial review even on the question of privilege.

For quite some time after this the courts desisted from interfering with the internal affairs of the legislatures treating them as legislative privilege. In 1993, for the first time, Speaker of a legislative assembly—of Manipur—was summoned to court under warrant. In 1998 the Supreme Court ordered a session of the Uttar Pradesh legislative assembly for a floor test to decide on the fate of the council of ministers. In 2005, also, the state legislature of Jharkhand was summoned under the

court's surveillance. The climax was reached in October 2006 when the Supreme Court demanded the proceedings of the on-going parliamentary committee on the bill on reservation for other backward classes in institutions of higher education. This was seen as a direct interference with the legislative process by the court and was declined.

In December 2005, 11 members of Parliament (nine from the House of the People and two from the Council of States) were expelled following a 'cash for query' and Members of Parliament Local Areas Development (MPLADS) fund scam. They approached the Supreme Court for remedy (*Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha & Others*). The Speaker of the House of the People and Chairman of the Council of States were summoned by the Supreme Court but they refused to attend the court on the ground of legislative privilege. The Solicitor-General, on behalf of the Attorney-General, and a senior advocate, on behalf of the Union of India, however, attended the proceedings. In a judgement delivered on 10 January 2007, the court asserted its power to review all decisions of Parliament but upheld the expulsion decisions. While delivering the main judgement Sabharwal, CJI, took the cue from *Keshav Singh* which, on the authority of Erskine May, had emphasized the need for give and take between the legislature and the judiciary.

The next day, in the *I.R.Coelho v. the Union of India* case, however, the court declared that all additions to the ninth schedule since the *Keshavananda Bharati* case in 1973 will be reviewed. When this is done, another bout of conflict between the government and the judiciary may be expected with a good dose of politics thrown into it. For, the ninth schedule started with land reform legislation which the court, after initial hesitation, accepted as a social necessity. It spread out to cover other legislations on property. The inclusion of the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes

(Reservation of Seats in Educational Institutions and of Appointments of Posts in the Services under the State) Act, 1993, by the seventy-sixth amendment in 1994, however, was totally unacceptable to the Supreme Court as the Act related to one of the most controversial issues of Indian politics, not yet judicially settled.

Contempt

A related issue is that of contempt of the legislatures and the courts. The concept of contempt is somewhat similar to that of libel; but it is different in two major ways. A libelled person approaches a court of law for remedy/compensation. The courts and the legislatures themselves punish their contemnors. The power to punish contempt is a privilege, whereas the suit of libel is a right. The contempt law is necessary for the protection of the independence of the judges and to get their orders followed, particularly by the government officers, and the legislators to do their work without fear or favour.

The legislatures have not framed any laws of their contempt. They adopt the procedure for trying contempt on the basis of the practices of privilege. However, Parliament has made legislation on the contempt of court. According to the Contempt of Court Act, 1971, whereas civil contempt means disobedience of a court order, criminal contempt means the publication (whether by words, spoken or written, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which: (i) scandalizes or tends to scandalize, or lowers or tends to lower the authority of, any court, or (ii) prejudices, or interferes or tends to interfere, with the due course of any judicial proceeding, or (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner. Thus the scope of contempt is broader than that of libel which springs out of uttered or written words. It attaches not only to words but

also to acts of a contemnor.

As far as the courts are concerned, although there is a litany of exemptions from the scope of scandal, the question begging answer is if the judges outside the court are covered by the act. For example, if a judge or her/his family is stalked outside the court, will it not interfere with the delivery of fair justice? On the other hand, when .an angry judge holds a court on the railway platform to punish the railways for dishonouring his reservation ticket or on the road to punish political demonstrators blocking his way to court, is (s)he not crossing the limit of authority? Once the judiciary has breached the wall of privilege of the legislature, as in *Raja Ram*, the whole idea of contempt, which is but the other side of the coin of privilege, has come under public scrutiny. The legislature is constitutionally forbidden to discuss the conduct of the judges except by way of moving a resolution for preparation of an address to the President seeking a judge's removal. That is an extreme step, and it has not been successful so far. Issuance of warrant against two judges of the Allahabad High Court by the Speaker of the U.P. legislative assembly in 1964 is now seen as an aberration. On the other hand, investigative journalism, often accompanied by sting operation, has played havoc on the life not only of several politicians, but also of some judges leading, in the former case, to expulsion of the faulty members and, in the latter case, to contempt proceedings.

There is one more difference. Contempt proceedings in a legislature are elaborate and time taking. They have to go through multi-party committees. Contempt proceedings in a court are faster and more frequent than those in the legislature because they are handled by individual judges. At the same time, courts affect the lives of the people more than legislatures do in the short term.

There is an ongoing debate in the country on whether

the contempt law is intended to protect the judicial process from undue pressure and intimidation to make delivery of justice impossible or to protect the judges *personally* from assault on their reputation. The second ground is a legacy from the monarchical times when the courts derived their authority from the hallowed position of the crown. In a republican system this claim is untenable and every holder of a public office is ultimately accountable to the people. Individually, judges are also citizens and entitled to the protection of the law of libel.* Why should the judges need the additional power of contempt except to defend their capacity to deliver judgement without fear or favour? What is the protection of the citizens from corrupt/prejudiced judges? Recently, however, the Supreme Court has allowed *truth* as a defence of the citizens in a contempt case provided that such truth is in public interest.

Debate on Appointment and Accountability

In the case of *All-India Judges Association v. the Union of India* the Supreme Court, in 1993, directed the Union and the states to create an all-India judicial service. The process of appointment of higher judges that was being criticized since the end of the 1975-77 emergency came under challenge in the *Supreme Court Advocates v. the Union of India* case in 1993. A nine-judge bench of the court laid down that the seniormost judge of the Supreme Court considered fit to hold the office should be appointed the Chief Justice of India (CJI). Consultation with the CJI, besides the judges required to be consulted under Article 124(2), is obligatory for the appointment of the other judges of the Supreme Court.

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* The only shortcoming of the law of libel is that the citizens have no protection against any allegation/remark made against them on the floor of a legislature. But protest against such allegation/remark may be conveyed to the presiding officer of a legislature or through the media.

Consultation should generally mean concurrence and consulting the CJI would require the CJI consulting his senior colleagues. The judgement filled a vital lacuna in the appointment process. There was no direction of the constitution on the appointment/selection of the CJI because of which allegations of bias were raised on this appointment especially during the Prime Ministership of Indira Gandhi.

The 1993 judgement in the case of *All-India Judges Association v. the Union of India* the Supreme Court encouraged talks of a national judicial authority/commission to regulate appointment, conduct and removal of the judges floated around as there was an unsuccessful move for replacing a tainted Supreme Court judge through an address to the President. There are three proposals on the composition of the commission: (1) It may be an all-judge body. (2) It may comprise public men not associated with the legal profession. (3) There should be a balance of the professionals and the laymen in the commission. In any case, the proposed commission would take away a part of the power of the CJI on the appointment of the judges, if not induct an element of politics, into it. On the other hand, leaving the entire process to the top members of the judiciary could create a self-perpetuating system of privilege and nepotism.

In 1998, a presidential reference to the Supreme Court of India for clarification of certain points in the judgement led to another nine-judge bench delivering the following opinion.

(1) As to the appointment of the Supreme Court judges, the Chief Justice of India should consult a collegium of four seniormost judges; even if two judges gave adverse opinion, the CJI should not send the recommendation to the government.
(2) The collegium should decide by consensus and, unless the opinion is in conformity with that of the CJI, no recommendation should be made.
(3) As to the transfer of High Court judges, in addition to the

four-judge collegium, the Chief Justices of the concerned High Courts are to be consulted.

(4) For appointment of High Court judges the CJI should consult two seniormost judges of the Supreme Court.

(5) The consultation process requires consultation of a plurality of judges and not the CJI alone.

(6) The transfer of *puisne* judges may be judicially reviewed only if the CJI recommended the transfers without consulting the collegium and the two Chief Justices of the High Courts concerned.

(7) The CJI may additionally consult other judges conversant with the affairs of the High Court.

(8) Strong and cogent reasons must exist for not recommending a person's name. Only positive reasons may be given. The views of the other judges consulted by the CJI should be in writing and should be conveyed to the government along with the CJI's recommendation.

Recently, the method of appointment of High Court judges has become a subject of controversy. Early in 2007, the Supreme Court collegium recommended the promotion of an Allahabad High Court judge, Jagdish Bhalla, as a Chief Justice. Due to an allegation about the involvement of his family in a land scam, his first appointment to the Kerala High Court was strongly opposed by a committee for judicial accountability and judicial reform comprising members from the legal fraternity. The President had once returned his file to the law ministry. The Speaker of the House of the People sought an explanation from the Union law minister on the appointment. The judge was shifted to the Chhattisgarh High Court where he was equally resisted. Finally, he was posted at the Himachal Pradesh High Court.

On the other hand, CJI V.K. Sabharwal strongly defended him in a press conference on the eve of his retirement. Following retirement Sabharwal was himself confronted with

an allegation of favouring the builder lobby by his firm insistence on sealing of commercial buildings in residential areas of Delhi. When the cases of the judges' appointment came to the Supreme Court, in an affidavit of the Union government in March 2008, it was revealed that as many as 351 High Court judges had been permanently appointed, since 1999, on the recommendation of the CJI without consulting the collegium.

More problematic is the regulation of conduct of the high-level judges. There is no constitutional provision for removal of an erring judge except by means of an address by both the Houses of Parliament to the President. At least one retired CJI has come under scanner in the recent period. In 1993, a move to address the President demanding the removal of a Supreme Court judge, V. Ramaswamy, failed because of the abstention of the members from the majority party in Parliament, the Indian National Congress. On the other hand, at least one Chief Justice of a High Court (Bombay) was forced to resign under the cloud of corruption charges. One wasteful, but easy, solution to this problem is for the Chief Justice not to allot an erring judge any case to decide, as was done in the case of Ramaswamy, J.

Problems of the Judiciary

There are numerous material problems confronting the Indian judiciary. The number of courts in the country is hopelessly small for the size of the population compared to the advanced countries in the world. The secretarial assistance to the judges—the court staff—is insufficient and antiquated. The emoluments of the judges are inadequate. A senior advocate of the Supreme Court may earn about ten times a judge of the same court. The state judicial services, to which most of the lower court judges belong, are regarded as the least attractive of the state civil services. Buildings of the subordinate courts

are dilapidated. A huge public investment is needed to improve the quality of the Indian judiciary at all levels.

Tribunals

The 42nd amendment provided for the creation of two kinds of tribunals: administrative tribunals (Article 323A) and tribunals for other matters (Article 323B). The Tribunals Act, 1985, created a central administrative tribunal and allowed the setting up of administrative tribunals in states. Tribunals are semi-judicial bodies within the administration meant for easing the grievance-solving process by reducing the complications of court proceedings so much so that an aggrieved employee may personally appear in their proceedings. They are also meant to reduce the work load of the courts. These tribunals have power to punish for contempt. Jurisdiction of all courts except the Supreme Court was excluded. As per a decision of the Supreme Court on 15 March 1997, however, appeals against the orders of the administrative tribunals shall lie in the division bench of the concerned state's High Court.

The 42nd amendment empowered the appropriate legislatures to set up, by law, tribunals for trial of any dispute regarding (a) levy, assessment, collection and enforcement of any tax; (b) foreign exchange, import and export across customs frontiers; (c) industrial and labour disputes; (d) land reform; (e) ceiling on urban property; (f) election to the House(s) of Parliament and state legislatures; (g) production, procurement, supply and distribution of foodstuff and other essential commodities; (h) rent and tenancy issues including the rights of landlords and tenants; (i) offences against laws with respect to any of the matters specified above; and (j) any of the matters incidental to any of the said matters.

Decisions of tribunals are liable to be challenged in the Supreme Court under Article 32 and in the High Courts under

Article 226. The High Court may issue the writ of *certiorari* if a tribunal acts beyond jurisdiction or in excess of jurisdiction. Article 227, further, has vested in the High Court the supervisory authority over all tribunals as well as courts in the state.

Lok Adalats and Nyaya Panchayats

Lok Adalats are not judicial bodies. They were set up in towns and cities to bring in settlement of disputes through agreements of parties and to reduce the volume of judicial work. After the passage of the Consumer Protection Act, 1986, a consumer dispute redressal commission was set up in 1955. It has branches in almost every district of the country. This is a quasi-judicial authority headed by the minister for consumer affairs at the Union and the state levels. There are *nyaya panchayats* (village courts) in some states for securing inexpensive justice in rural India though the 73rd amendment is silent on it.

XIII

THE SENTINELS OF INDIAN DEMOCRACY

A constitutional government is a limited government. It is ensured, in a presidential system, by separation of powers and, in a parliamentary system, by responsibility of the executive to the legislature. A constitutional government becomes a democracy when it becomes truly representative. And by 'truly representative' democracies mean elective, by universal adult franchise. Paradoxically, the major democracies do not directly grant franchise as a fundamental right, one major reason of this paradox being administrative, namely, practical impossibility to enroll all eligible voters.

The Election Commission

Though India decided upon universal adult franchise, it was not incorporated in Part III of the constitution. It was put in Part XV of the constitution dealing with elections. Article 326 said that elections to the House of the People and the state legislative assemblies would be based on adult franchise, the word 'universal' being missing. Every adult citizen, not disqualified by any law, however, is entitled to be registered as a voter. Substantially, therefore, voting right is available to a registered citizen and registration is an entitlement of all qualified adults. It is a right to be enrolled a voter, but not to vote.

Right to be registered a voter, according to the Supreme Court in two cases in 2006 (*Shrikant v. Vasantrao* and *Kuldip*

Nayar v. the Union of India), is a statutory right and not a fundamental right or even a constitutional right. Its denial by inadvertence or otherwise cannot be remedied by writs of the Supreme Court under Article 32, but by moving the High Court under Article 226. The Andaman and Nicobar islands cast their votes for the first time in the 1971 election to the House of the People. The people of the north eastern frontier tracts (now known as Arunachal Pradesh) cast their votes for the first time in the 1977 election. Voting right was earlier withheld from these regions on the ground of their extreme backwardness.

Elections to the House of the People and the state legislative assemblies are held on the basis of the first-past-the-post in single-member territorial constituencies. Election of the President, the Vice-President and to the Council of States and the legislative councils, where they exist, are held on the basis of proportional representation. Article 325 says that no person shall be ineligible for inclusion in an electoral roll or claim to be enrolled in a special electoral roll in any constituency on grounds only of religion, caste, sex or any of them. Article 326 confers the right to become voters to citizens of India of the age of 18 or above not disqualified on ground of non-residence, unsoundness of mind, crime, or corrupt or illegal practice per the law of the appropriate legislature. According to Article 327 Parliament may, from time to time, by law make provision for all matters relating to, or in connection with, election to either House of Parliament or to the House(s) of state legislatures. Further, Article 328 allows the state legislature to make provision for electoral matters in so far as they are not covered by the parliamentary acts.

There are two important stages in the preparation for a general election: delimitation of constituencies and preparation of electoral roll on the basis of the constituencies. Parliament passed the Representation of the People Acts, 1950 and 1951,

and the Delimitation Commission Acts, 1952, 1962, 1972, 2002. The delimitation acts corresponded to the decadal census up to 1971; the long gap between 1972 and 2002 is explained by the freezing of delimitation at 1971 by the 42nd amendment in 1976. According to Article 329 the validity of any law relating to the delimitation of the constituencies or the allotment of seats in such constituencies, made or purported to be made according to Article 327 or 328 shall not be called in question in any court. Further, no election to any House of Parliament or state legislature shall be called in question except by an election petition to such authority and in such manner as may be prescribed by or under any law made by the appropriate legislature. Under the Representation of the People Act, 1951 the power to decide an election petition vests in the High Court and, on appeal, the Supreme Court. This means that there may be appeals against the decisions of the Election Commission on an election dispute.

Under Article 323B, inserted by the 42nd amendment, the appropriate legislature has been authorized to set up tribunals to decide election disputes to the exclusion of all courts other than the Supreme Court; but no such law has been passed. However, tribunals operate at the *panchayat* elections conducted by the state Election Commissioners under Article 243K.

The entire process of 'superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to Parliament and to the legislature of every state and of elections to the offices of President and Vice-President held under the constitution' is entrusted to the Election Commission of India (Article 324). The Election Commission consists of a Chief Election Commissioner and such other Election Commissioners as the President may from time to time fix. There is no upper limit to the number. Subject to the provisions on this behalf made by Parliament, President

will make the appointments. When any other Election Commissioner is appointed the Chief Election Commissioner shall act as chairman of the Election Commission. Before each general election to the House of the people and to each state legislative assembly and before each biennial election to any state legislative council the President may also appoint, after consultation with the Election Commission, such regional commissioners as considered necessary to assist the Election Commission in performing its functions.

Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and regional Election Commissioners shall be such as President may by rule determine. The salience of the Chief Election Commissioner's office is demonstrated by the fact that he may not be removed from office except in the same manner and on the like grounds as a judge of the Supreme Court. Neither can the conditions of his service be varied to his disadvantage after his appointment. Any other Election Commissioner cannot be removed from office except on the recommendation of the Chief Election Commissioner. Opinion is sharply divided on whether the Chief Election Commissioner can *suo moto* recommend the removal of an Election Commissioner. There are, however, two differences between the Election Commission and the Supreme/High Court. Members of the commission do not take an oath of office, and there is no contempt power of the commission. When requested by the Election Commission the President or a state Governor shall make available to the Election Commission or a regional commissioner such staff as would be necessary for their function.

Though the Election Commission started as a mere administrative body for organizing the elections, since the appointment of T.N. Seshan in 1990 as the Chief Election Commissioner, the commission has been going through a major

process of transformation. The commission took upon itself the responsibility of disabusing the electoral process of all kinds of corruption and political influence. The commission forbade the use of office, official resources like government officials, official vehicles, pre-electoral sops and promises to influence voters by ministers, evolved a model code of conduct among political parties in electoral contest, ordered transfer of government officials suspected to be working in favour of political parties, misuse of government media and public places and, even, defacing of public and private buildings by graffiti, hoardings and posters. It postpones or cancels polling whenever/wherever complaints of money laundering and use of muscle power is received. There is substantial, though not complete, success. The greatest problem that cropped up was criminalization of politics indicated by entry of history-sheeters in the contests and, eventually, in the legislatures.

In 1997 the Election Commission took an initiative in this respect by issuing an order on disqualification of legislators under Section 8 of the Representation of People Act, 1951 clarifying that disqualification of a person convicted of a criminal offence takes effect from the date of conviction by the trial court, irrespective of whether or not the convicted person is released on bail during the pendency of any appeal. The commission also issued a pro-forma in which a candidate should furnish information on her/his criminal background, if any. Upon a suit filed by the Association for Democratic Reforms against the Union of India, the Delhi High Court, in 2000, passed a judgement directing the Election Commission to seek and disclose (i) information on candidates including their criminal records, if any; (ii) financial details of the candidates, their spouses and dependants and (iii) any other facts that can give insight to a candidate's competence and suitability. The Union government filed an appeal against the High Court judgement in the Supreme Court. On 2 May 2002,

the Supreme Court declared that the scope of Article 324 is very wide, that voters had a right to information on the candidates, and that right to information is a fundamental right within the right to freedom of thought and expression under Article 19(1)(a).

As the government did not act upon the Election Commission's plea for a suitable legislation to enforce the Supreme Court's directive, the Election Commission, upon the basis of the Supreme Court order, in June 2002, issued its own directives. Government held an all-party meet in the next month and, on the basis of a consensus, from which the chief opposition party, the Indian National Congress, later withdrew, sent a draft ordinance to the President denying the courts and the Election Commission any role in the proposed disqualification. President returned it for reconsideration of the council of ministers. After the draft ordinance came to him for the second time, President signed it. In December, the Representation of People (Third Amendment) Act was passed on the line of the ordinance. In early March 2003, the Supreme Court declared its operational part (Section 33B) invalid and upheld the Election Commission's earlier directive. The court, however, denied the Election Commission the right to declare a candidature void on summary verification of the candidate's liabilities and assets. The Election Commission, accordingly, issued a revised directive declaring that the refusal of a candidate to furnish the required information will entitle her/him to be rejected by the commission. The other directives had to be adhered to. The Election Commission would circulate the information supplied by each candidate on affidavit and the counter-affidavit by a rival candidate, if any, among the voters.

In July 2002, the Gujarat legislative assembly was dissolved on completion of five years requiring a fresh election before October 2002 to enable the assembly to meet within six months

after the end of the last session of the previous assembly, as is required by Article 174(1). In view of the widespread communal riot in the state resulting in displacement of a huge number of voters, however, the Election Commission declared the holding of a free and fair election within that period impossible. The President made a reference to the Supreme Court for advisory opinion under Article 143 on the following questions: (1) Does Article 174(1) of the constitution (permitting a gap of but six months between two sessions of a House) yield to Article 324, that is to say, could the time frame laid down in Article 174(1) be subjected to the decision of the Election Commission under Article 324 to hold the election. (2) Can the Election Commission frame a schedule for election to an assembly on the premise that any infraction of the mandate under Article 174(1) would be remedied by resorting to Article 356 by the President? (3) Is the Election Commission bound by the mandate of Article 174 by drawing upon the requisite resources of the Union and the state to ensure free and fair election?

The Supreme Court held that the two articles are independent of each other and Article 174(1) could not limit the power of the Election Commission under Article 324 and that the holding of elections was in the exclusive domain of the Election Commission. The bench said Article 174(1) applies only to an existing assembly and not to a dissolved one. Therefore, there is no time limit for holding of elections for an assembly dissolved prematurely. By the same token the court rejected the Election Commission's arguments that Article 174 (1) will yield to Article 324 in matters of conducting elections. And, as there was no infraction of a mandate, the question of application of Article 356 did not arise. Article 324, however, did cast a responsibility and duty on the Election Commission to hold polls at the earliest as timely election was an essence of democracy. Holding that,

ordinarily, law and order should not be a ground for deferring the holding of election, the court allowed the Gujarat council of ministers to work in a care-taker capacity.

This exceptional decision, taken because of an extraordinary situation, however, may create a constitutional crisis if extended to the election of all state legislatures and the House of the People. An unscrupulous council of ministers at a state or at the centre may get the popular House dissolved immediately after a session is over and, with the connivance of the law and order machinery, make elections impossible over a long time.

Public Service Commission

The public service commission (PSC) guards the entry into the bureaucracy—the permanent executive/administration—as a clean, efficient and politically neutral bureaucracy is a *sine qua non* of parliamentary democracy. Article 309 empowered Parliament to regulate the recruitment and conditions of service of the Union's public servants (as it did the state legislatures for officers at the state level) subject to the other provisions of the constitution. Articles 315-323 set up public service commissions at the Union and the states levels for all public appointments. Two or more states may decide to have a common public service commission. Any state may ask the Union to serve any or all its needs about appointment to its services and the Union Public Service Commission (UPSC), with the permission of the President, may accept it.

Care has been taken to ensure the independence of the public service commissions. The chairman and other members of a PSC are appointed by the President in the case of the Union and the Governor in the case of a state. As nearly as may be one-half of the members of a PSC must be bureaucrats of al least ten years' standing. In case of vacancy in the post of a chairman or his absence, President, in the case of the UPSC,

and the Governor, in the case of a state PSC, will appoint another member of the commission to serve as chairman. Members of the UPSC hold office for six years or up to the age of 65, whichever is earlier. Members of a state PSC hold office for six years or up to the age of 62. A member of a PSC may resign by addressing a letter to the President or the Governor, as the case may be.

But the chairman and other members of the PSCs may not be removed just by withdrawing the pleasure of the President/Governor. To remove any of them the President has to make a reference of a ground of misbehaviour to the Supreme Court and the Supreme Court, after inquiry, has to recommend the member's removal. During the pendency of the reference in the Supreme Court, the President or the Governor may suspend an accused member. The conditions of service of the members may not be varied after appointment to their disadvantage. A member of the UPSC, other than the chairman, may be appointed chairman and a chairman of a state PSC may be appointed a member or chairman of the UPSC as a member of a state PSC may be appointed chairman of the same or any other state PSC or a member of the UPSC. They may not take any other government appointment after retirement.

It is the duty of the Union and state PSCs to conduct examinations for appointments to the services of the Union and states respectively. It is also the duty of the UPSC, if requested by two or more states so to do, to assist those states in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required. The PSCs are consulted on all matters relating to methods of recruitment to civil services and for civic posts; on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and suitability of candidates for

such appointments, promotions or transfers; in all disciplinary matters affecting a government servant in civil capacity; on defraying costs incurred by a government servant in civil capacity for defending legal proceedings against her/him for her/his official actions; and claiming pensions for injuries sustained while serving the government. All regulations made by the President or state Governors after such consultation shall be laid before the respective legislatures and are subject to modification and repeal. Parliament or state legislatures may extend the functions of the corresponding PSCs. The PSCs' expenses are charged on the consolidated funds of the respective governments. They make annual reports to the President or the Governors as the case may be.

The Comptroller and Auditor-General

The chairman of the drafting committee on the Indian constitution, B.R. Ambedkar, called the Comptroller and Auditor-General the 'most important officer in the Indian constitution'. If the Election Commission guards the gate of the legislature by controlling the entire process of representation, besides conducting the elections of the President and the Vice-President, and the public service commissions guard the gate of the bureaucracy, the Comptroller and Auditor-General is the chief night watchman who keeps an eye on the most vital source of the government's power, namely, funds.

This office partly resembles an office of the same name in the United Kingdom but falls short of it in respect of powers and functions. The British Comptroller and Auditor-General is in official charge of the treasury, which, theoretically, belongs to the crown, and audits its account. No money can be withdrawn by a ministry without the Comptroller and Auditor-General's order to issue it. This power is absent in the Indian case. Republican India adapted the format of the Auditor-

General of India who had only the auditing power and no issuing power under the Government of India Act, 1935, but adopted the British name. The British practice checks the process of withdrawal of fund before-hand, and stops any unauthorized or excess withdrawal and, following the expenditure, checks the authority and manner of the expenditure. The Indian practice allows the ministries to draw money directly from the consolidated fund after it is sanctioned by the legislature, but submits the accounts after the expenditure for scrutiny and report to the legislature.

The Comptroller and Auditor-General keeps watch over both the Union and the states (including the Union territories with legislative assemblies). The accounts of the Union and the states are kept in the form that the President, on the advice of the Comptroller and Auditor-General, prescribes. Before the 44th amendment, it was the Comptroller and Auditor-General, with the approval of the President, who issued the form. The 44th amendment has underlined the advisory nature of the office. The reports are sent separately to Parliament and the state legislatures. Even this power is great and vital to the working of India's parliamentary democracy. The reports of the Comptroller and Auditor-General are submitted to the concerned legislatures. The public accounts committee of a legislature examines the report and makes its own report to the legislature. According to the Comptroller and Auditor-General (Condition of Office) Act, of 1971, as amended in 1976, his specific functions are:

(a) to audit and report in all expenditure from the consolidated fund of India and of each state and each Union territory having a legislative assembly as to whether such expenditure has been in accordance with the law;
(b) similarly, to audit and report on all expenditure from the contingency fund and public accounts of the Union and states;
(c) to audit and report on all trading, manufacturing, profit and

loss accounts, etc., kept by any department of the Union or a state;

(d) to audit the receipts and expenditure of the Union and of each state to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue;

(e) to audit and report on the receipts and expenditure of
  (i) all bodies and authorities substantially financed from the Union or state revenues;
  (ii) government companies;
  (iii) other corporations or bodies, when so required by the laws relating to such corporations or bodies.

The constitution of India has placed the Comptroller and Auditor-General on the same pedestal as a judge of the Supreme Court, in respect of appointment, emoluments, resignation, pension, oath and even the method of removal except for the fact that the appointment is exclusively an executive privilege and no consultation is necessary for it (Article 148). He holds office for six years or up to the age of 65, whichever is earlier. In other matters his conditions of service are determined by the rules applicable to the members of the Indian Administrative Service. A Comptroller and Auditor-General will not be eligible for any further government office after ceasing to hold his post.*

Welfare Agencies and Officials

The Indian constitution is not merely a political document. It also embodies commitment to social welfare especially for the weaker sections of the population. Article 338, originally,

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* This limitation has not been always adhered to. At least one retired Comptroller and Auditor-General was appointed chairman of a finance commission, a salaried post with tenure. Another became a state Governor.

provided for the appointment of a special officer for the scheduled castes and scheduled tribes. Article 339 provided that President may, at any time, and shall, at the expiration of ten years from the commencement of the constitution, appoint a commission to report on the administration of the scheduled areas and the welfare of the scheduled tribes in states. The executive power of the Union extends to the giving of directions to a state as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the scheduled tribes in the state. From time to time down to 1984 such a commission has been appointed. Partly due to their reports, Article 338 has, by now, been vastly expanded in scope. The sixty-fifth amendment in 1990 created a national commission for scheduled castes and scheduled tribes. By the eighty-ninth amendment in 2003 this commission was split into two: one for the scheduled castes and another for the scheduled tribes.

According to the new Article 338, the National Commission for the Scheduled Castes has a chairperson, a vice-chairperson and three other members appointed by warrant under the hand and the seal of the President. Subject to the provisions of any law of Parliament in this behalf, the President makes rules about the conditions of service and tenure of their office. The commission has the power to regulate its own procedure and enjoys the powers of a civil court, particularly, (a) summoning and enforcing attendance of any person from any part of India and examining him/her on oath; (b) requiring the discovery and production of any document; (c) receiving evidence on affidavits; (d) requisitioning any public document or its copy from any court or office; (e) issuing commissions for the examination of witnesses and documents; and (f) any other matter which the President may, by rule, determine.

It is the duty of the commission (a) to investigate and monitor all matters relating to the safeguards provided for the

scheduled castes under the constitution or under any other law in force or under any order of the government and to evaluate the working of such safeguards; (b) to enquire into specific complaints with respect to deprivation of rights and safeguards of the scheduled castes; (c) to participate and advise on the planning process of socio-economic development of the scheduled castes and to evaluate the progress of their development under the Union and any state; (d) to present to the President, annually and at such other times as the commission deems fit, reports on the working of those safeguards; (e) to make in such reports recommendations as to the measures that should be taken by the Union or any state for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the scheduled castes; and (f) to discharge such other functions in relation to the protection, welfare and development and advancement of the scheduled castes as the President, from time to time, may, subject to the provisions of any law made by Parliament, by the rules specify.

The President shall cause such reports to be laid before each House of Parliament along with a memorandum in regard to the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any, of any such recommendations. If the report or a part of it concerns a state government, a copy of it will be sent to its Governor to be laid before the state legislature in the like manner. The Union and state governments shall consult the commission on all major policy matters concerning the scheduled castes. In this article reference to scheduled castes will be construed to include such other backward classes as the President may notify and the Anglo-Indians.

The new Article 338A set up a national commission for the scheduled tribes on exactly the same terms as the national

commission for the scheduled castes. But the Union government has a greater control on state governments with regard to the interests of the scheduled tribes than those of the scheduled castes. Clause (2) of Article 339 says that the executive power of the Union extends to the giving of directions to a state as to the drawing up and execution of schemes specified in the direction to be essential for the welfare of the scheduled tribes in the state. There is no such authorization of the centre in respect of the welfare of the scheduled castes.

According to the seventh amendment dealing with the states reorganization in 1956 Article 350B provided for the appointment of a special officer for linguistic minorities. He was called the commissioner for linguistic minorities. He is appointed by the President. It is his duty to investigate all matters relating to the safeguards provided for linguistic minorities in the constitution and report from time to time, as directed by the President, to the President who will cause all such reports to be laid before Parliament and sent to the states concerned.

Statutory Bodies

Outside the mandate of the constitution Parliament has inherent power to set up any number of commissions in pursuit of its laws and resolutions. In 1978, the Union government set up a Minority Commission. In 1993, it grew into a national commission for minorities by an act of Parliament passed in the previous year. By the strength of the National Commission for Women Act, 1990, a National Commission for Women was set up in 1993. In 1993, following the Supreme Court order in *Indra Sawhney & others v. the Union of India & others* (the Mandal case) a National Commission for the Backward Classes by an act of the same name was set up with power of entertaining, examining and advising the government on,

requests for inclusion and complaints over over-inclusion and under-inclusion in the lists of other backward classes.

Vigilance

In the British period, corruption of government servants used to be addressed by the Indian Penal Code, 1860. Post-Independence India passed the Prevention of Corruption Act in 1947. That act was replaced by the act of the same name in 1988. The concept of government servants was replaced by that of public servant with wider denotation.

In 1964, a committee on prevention of corruption chaired by K. Santhanam recommended the setting up of vigilance commissions at the Union and at the state levels, and in 1966 the Administrative Reforms Commission suggested the establishment of ombudsmen (*Lok Pal*) at the Union and the state levels. The first committee was meant for checking corruption in public life, the second for receiving and examining public complaints. A Central Vigilance Commission (CVC) was set up through executive resolution in 1964. It got a statutory status in 2003 by the Central Vigilance Commission Act (Act 47 of 2003). The *Lok Pal* bill, that targeted politicians, was introduced eight times in as many Houses of the People since then. It was never passed.

The Vigilance Commission is essentially an advisory body comprising a Chief Vigilance Commissioner and two vigilance commissioners who enjoy the status equal to that of the chairman and members of the Union Public Service Commission respectively. Its main instrument of operation is the Central Bureau of Investigation (CBI), a special police force under the control of the Union, set up by the Delhi Special Police Establishment Act, 1946. It deals with several other tasks assigned by the government and the superior courts along with the tasks assigned by the CVC. But the greater limitation

springs from what is known as the 'single directive' issued by the Union government to CBI, in 1969, to seek the clearance of the ministry/ department concerned before undertaking investigation about a government official of the rank of joint secretary or above. In the so-called Hawala case (*Vineet Narain and others v. the Union of India and others*) in 1997, the Supreme Court declared the single directive void. In 1998, it was revived in the Central Vigilance Commission Ordinance and, in 2003, it was institutionalized in the Central Vigilance Commission Act on the plea that senior government officials should be protected from harassment in order to be able to work responsibly—a legacy of the colonial administration since 1898, when the Criminal Procedure Code was passed.

Information Commission

A major development in the democratic evolution of the country was the passing of the Right to Information Act by Parliament in 2005. The Act provided for the setting up of a Central Information Commission, appointed by the President, on the recommendation of a high-level committee chaired by the Prime Minister, and headed by a Chief Information Commissioner (CIC). The Chief Information Commissioner and information commissioners shall be persons of eminence in public life with wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance. The central information commission has the same status as that of the Election Commission. The states have similar information commissions. The function of the commission is to receive and deal with complaints of persons unable to secure information about the affairs of any public authority which have been required to appoint public information officials. The central and the state information commissions, while enquiring into a matter, will have the same powers as vested in the civil courts.

They can also impose penalty on the information officers for failure to furnish correct information within the prescribed time.

A public authority has been defined in the act as any authority or body or institution of self-government established or constituted by or under the Constitution; b) by any other law made by Parliament; by any other law made by state legislature; by notification issued or order made by the appropriate government, and includes any (i) body owned, controlled or substantially financed; (ii) non-government organization substantially financed, directly or indirectly by funds provided by the appropriate government.

However, under sub-section (1) of Section 8 of the Act there is no obligation to supply (a) such information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests, relation with foreign state or lead to incitement of an offence; (b) information which has been expressly forbidden to be published by any court of law or tribunal or the disclosure of which may constitute contempt of court; (c) information, the disclosure of which would cause a breach of privilege of Parliament or a state legislature; (d)information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information; (e) information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information; (f) information received in confidence from foreign governments; (g) information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

(h) information which would impede the process of investigation or apprehension or prosecution of offenders; (i) cabinet papers including records of deliberations of the council of ministers, secretaries and other officers. Provided that the decisions of council of ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over.

Further, those matters which come under the exemptions specified in this Section shall not be disclosed: (1) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the central public information officer or the state public information officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information. However, the information which cannot be denied to Parliament or a state legislature shall not be denied to any person. (2) Notwithstanding anything in the Official Secrets Act, 1923 nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests. (3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under Section 6 shall be provided to any person making a request under that Section. And, without prejudice to the provisions of Section 8, a central public information officer or a state public information officer, as the case may be, may reject a request for information where such a request for providing access would involve an

infringement of copyright subsisting in a person other than the state.

The Vigilance Commission and the Information Commissions are two great sentinels of democracy created by the Indian Parliament. But they are rather young institutions. They will require some time to work out the modalities of their work. A delicate controversy broke out in April 2008 when CJI, K.G. Balakrishnan, claimed that the CJI is not a public servant but a constitutional authority and outside the reach of the RTI Act. In its 25th report the parliamentary committee of the Ministry of Law and Justice, submitted on 29 April 2008, on the other hand, stressed that, except the judicial decision making, all other activities of administration and the persons included in the judiciary are subject to the RTI Act and, in *The Hindu* of 2 May 2008 V.R. Krishna Iyer, a distinguished former judge of the Supreme Court came out with a powerful support of the view. Dispensing public justice without fear or favour, as per their oath, according to Iyer, is a public service and judges are public servants ('Judges are public servants, not bosses'). By that logic, of course, every official, the President of India downward, every legislator and every member of a local body is a public servant. Only, the President and the state Governors have functional immunity during their tenures. In fact, the Indian Penal Code defined a public servant long back to include every Judge, including any person empowered by law to discharge, whether by himself or as a member of any body of persons, any adjudicatory function. The definition was confirmed by a 5-judge bench of the Supreme Court, in the case of *K. Vimola v. K. Veeraswamy*, 1991, which held that High Court or Supreme Court judges can be prosecuted under Prevention of Corruption Act after obtaining sanction from the Chief Justice of India, just as for a civil servant sanction has to be

obtained from his appointing authority.

The only flaw in the judgement, which did not spell out under whose sanction the CJI could be prosecuted, is that the CJI is not the appointing authority of the judges of the Supreme Court and High Courts. The appointing authority of all those judges, including the CJI, is the President of India. Removal of judges under Article 124(4) is different from their prosecution with which the right to information is connected. And prosecution is necessary before removal of a judge on the ground of 'proved misbehaviour'.

XIV

THE EMERGENCIES

We discuss emergencies separately as they, unlike in most other democratic constitutions, occupy a special place—a full part (Part XVIII)—in the Indian constitution. And we discuss it in the plural. There are three kinds of emergency: emergency proper, declaration of constitutional breakdown and financial emergency.

Emergency Proper

The President of India has some emergency powers. (S)he has power to declare emergency in the country or any part of it if (s)he is satisfied that a grave emergency exists whereby the security of India or any part of it is threatened by war or external aggression or armed rebellion. Such a proclamation may be made even before the actual occurrence of war, external aggression or armed rebellion if the President is satisfied that a threat of their occurrence exists. It will be revoked only by a subsequent proclamation. Every proclamation issued under this article (Art. 352) shall be laid before each House of Parliament and shall, except when it is a proclamation revoking a previous proclamation, cease to operate at the expiration of one month unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. If any proclamation imposing emergency is issued at a time when the House of the People is dissolved, or the dissolution takes place during the period of the said one month, and if a resolution

approving the proclamation has been passed by the Council of States, but no resolution on the proclamation has been passed in the House of the People before the expiration of that period, the proclamation shall cease to operate at the expiration of 30 days from the date on which the House of the People first sits after its reconstitution, unless before the expiration of the said 30 days a resolution approving the proclamation has also been passed by the House of the People.

A proclamation so approved shall, unless revoked, cease to operate on the expiration of six months from the second of the resolutions approving the proclamation. It may, however, be continued, by passing a resolution of approval, beyond every six months. If, during any of these six months, the House of the People is dissolved before approving the continuance and the Council of States has approved of it, the proclamation shall cease to operate on the expiry of 30 days after the House of the People sits after reconstitution unless by that time the House of the People approves of it. In approving the emergency or its continuance a majority of the total number of members and a two-thirds majority of the members present and voting must endorse the resolution.

Notwithstanding anything in the above provisions, if the emergency or its continuance is disapproved by the House of the People, President shall revoke the proclamation [Article 352(7)]. The significance of this clause is that, whereas the executive has to seek the approval of both the Houses by a special procedure for the imposition or continuance of an emergency, the House of the People alone, of its own, may force its termination. Not less than one-tenth of the members of the House of the People may sign a notice to the Speaker, if the House is in session, or to the President, if the House is not in session, giving their intention to move a resolution disapproving of the emergency or its continuance, and a special sitting of the House will have to be held within 14 days of

receiving such notice to consider the resolution.

The 1975 emergency and its aftermath saw a spate of constitutional amendments. This one was proclaimed on 25 June 1975 as an emergency within an emergency that had been in place since the 1971 India-Pakistan war. A rectification of this anomalous situation was made by the 38th amendment on 1 August 1975 by the incorporation of a new clause in Article 352—Clause (9)—declaring that different proclamations of emergency could be proclaimed on different grounds—of war, external aggression and internal disturbances, whether or not there is already a proclamation in operation.

Two significant changes in the emergency provisions that were brought about by the 44th amendment were substitution of 'armed rebellion' for 'internal disturbances' as one of the grounds of such proclamation, and formalizing the way that the President could be advised on the proclamation of emergency, requiring that the President may issue a proclamation of emergency only upon a written advice of the Union cabinet (Article 352). Besides these two changes, the 44th amendment reduced the life of an unapproved proclamation of emergency from the original two months to one month and made it specific that the unapproved proclamation of emergency shall cease to operate after that.

Under Article 250, Clause (1) of the original constitution there is a plenary power of Parliament to make laws for the whole or any part of the territory of India with respect to any of the matters enumerated in the state list during the operation of a proclamation of emergency. According to Clause (2) of the same article, a law made by Parliament which Parliament would not but for the issue of a proclamation of emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the proclamation has ceased to operate, except as respects things done or omitted to be done before

the expiration of the said period. According to Article 353(2) the power of Parliament to make laws with respect to any matter shall include power to make laws conferring powers and imposing duties, or authorizing the conferring of powers and the imposition of duties, upon the Union or officers and authorities of the Union as respects that matter, notwithstanding that it is one which is not enumerated in the Union list. The effect of this power is with respect to the Union-state legislative relation.

According to Article 353(1), at the same time, during the operation of the proclamation of emergency the executive power of the Union extends to the giving of directions to any state as to the manner in which the executive power thereof is to be exercised. In sum, therefore, during the operation of a general emergency, the Union's legislative and executive powers could go beyond the confines of the Union list.

The 42nd amendment enlarged the emergency jurisdiction of the Union. During the operation of emergency in any part of the country the executive power of the Union to give direction and its legislative power shall also extend to any state other than the state in which the emergency is in operation if, and in so far as, the security of the country or any of its parts is threatened by activities in or in relation to the part of India where the emergency is in operation. The 44th amendment did not change this (territorial) extension. But it limited the maximum period of emergency that was not approved by Parliament from two months (under the original constitution) to one month and the emergency that has been once approved by Parliament from a maximum of eight months to six months.

Under Article 358, on the other hand, a somewhat similar, but more wide-ranging, authority over the citizens was granted while it laid that nothing in Article 19 would restrain the state (including governments and legislatures at the Union and the

state levels) from making any law or taking any executive action which the state would, but for the provisions contained in Part III, be competent to make. But any law so made would, to the extent of the incompetency, cease to have effect as soon as the proclamation would cease to operate, except as respects things done or omitted to be done before the law would cease to operate. The 44th amendment required such law to contain a recital to the effect that such law is in relation to the proclamation of emergency in operation. This requirement ensures that such a law will automatically cease to operate after the end of the emergency. It also creates a scope for judicial scrutiny of a law made and consequent executive actions taken during a general emergency.

Under the original Article 359, the President could by order declare the suspension of the right to move any court for the enforcement of the rights in Part III. Every such order would have to be laid before each House of Parliament. The 44th amendment excepted Articles 21 and 22 from this plenary power of the executive meaning that, during operation of the proclamation of emergency, the President could not suspend the right to move a court for the enforcement of the right to life and liberty and the right against detention. This amendment was a direct reaction to the controversial judgement of the Supreme Court in A.D.M. *Jabalpur v. Shukla* (1976) to the effect that under the President's order suspending the right of persons to move the court for the enforcement of their rights they lost the *locus standi* to challenge an order of detention, and has great bearing upon the right to life and personal freedom of people.

Proclamation of Constitutional Breakdown

The second kind of emergency, discussed in some detail in chapter X, is the proclamation of constitutional breakdown in a state by the President in case (s)he is satisfied that a situation

has arisen in which the government of the state cannot be carried on in accordance with the provisions of the constitution (Article 356). This proclamation has to be approved by resolutions of both the Houses of Parliament, failing which it will lapse after two months. Consequent upon such proclamation President's rule is applied; the functions of the state government are taken over by the Union government. The council of ministers in the states are usually dismissed and the state legislatures dissolved or kept in suspended animation. This power has evoked more sustained controversy than the earlier one, since 1959, when President's rule was imposed in Kerala. It needs no repetition that it is invoked on the advice of the Union council of ministers.

Two points need to be made. A constitutional breakdown occurs in course of regular politics, and, although exceptional in theory, it has become a regular feature in Indian politics. It hardly deserves the attribute of emergency. Secondly, this provision, almost always, has been invoked against governments run by parties or coalition of parties other than the one (party or coalition of parties) ruling at the centre. In the famous *Bommai* case the Supreme Court ruled that, although it has no power to examine the merit of an advice of the council of ministers to the President, it has the power to examine the relevance and *bona fide* of such an advice. The court ruled that, until the proclamation is approved by Parliament, the state legislatures may be kept in suspended animation and not dissolved. In effect, the court has nullified several supersessions of the provincial legislature and re-instated them.

Financial Emergency

The third kind of emergency is a financial emergency that is to be proclaimed if the President is satisfied that a situation has arisen whereby the financial stability or credit of India or

of any part thereof is threatened (Article 360). During its operation the executive authority of the Union will extend to the giving of directions to any state to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President would deem necessary (Art. 360). An extra-ordinary power vested in the President by this article is to issue directions requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a state, reservation of all money bills and other financial bills for the consideration of the President and reduction of salaries and allowances of any class of persons serving in connection with the affairs of the Union including the judges of the Supreme Court and the High Courts. This kind of emergency has never occurred in India.

XV

LOCAL GOVERNMENT

According to the seventh schedule, local government is a state subject. With a view to strengthening the democratic base of the polity and achieving decentralization of power toward the grass routes, as envisaged by Article 40 of the constitution, however, the 73rd and the 74th amendments to the constitution were made in 1993. The first referred to rural self-government (*panchayats*) in Part IX, the second, going beyond Article 40, to urban self-government in Part IXA. These local governments, however, work on the principle of delegation of administrative power rather than of constitutional autonomy. Constitution of local bodies is mandatory but their powers, including those on taxes, duties, tolls, fees and fund are recommendatory. There is no provision for grant-in-aid to the local bodies from the consolidated fund of India.

Panchayats

The first novelty of the scheme rests in direct election of members of the *panchayats* from territorial constituencies at all levels. Above the *gram sabhas* (village assemblies) consisting of all the registered voters of a village there are three levels of *panchayat* for states having a population of 20,00,000 or more: village, intermediate and district The states with population below that number may not have an intermediate level. The details of their structure and their functions and sources of funding are laid down by state legislations. Besides the directly

elected members, state legislatures may, by law, provide for representation of chairmen of the village-level *panchayats* at the intermediate-level *panchayats* and, if there is no intermediate-level *panchayat*, at the district level. Chairmen of the intermediate-level *panchayats* may be, similarly, given representation at the district level. Members of the House of the People and the legislative assembly of the state, whose constituencies partly or wholly comprise a *panchayat* area higher than the village level, may be given representation. Members of the Council of States and members of the state's legislative council may be given representation at the intermediate-level *panchayat* under which they are registered as voters and the district-level *panchayat* under which they are registered as voters. They will have right to vote in the *panchayats*. A state Election Commissioner is appointed by the Governor to conduct the elections to the *panchayats* that would ordinarily have five-year tenure. The permissible minimum age of the *panchayat* members is 21. They may be disqualified if they are disqualified to be members of their state's legislature or disqualified by or under any law of the state legislature. Chairpersons at the village *panchayats* will be elected in such manners as the state legislatures, by law, may provide. Chairpersons at the higher levels shall be elected by elected members of such *panchayats* from amongst themselves. Chairpersons of the village *panchayats* may not necessarily be elected by its elected members.

The second novelty, of similar moment, is the provision of reservation of seats for scheduled castes and scheduled tribes in the *panchayats* proportionately with their strengths in the population of the *panchayat* area. At least one-third of the number of seats in the *panchayats* reserved for the scheduled castes and the scheduled tribes shall be reserved for the women of those classes. Including such reservation, at least one-third of the total number of seats in a *panchayat* shall be reserved for

women. Such reserved seats shall rotate among the *panchayats*. Offices of the chairpersons of the *panchayats* at all levels shall be reserved for the scheduled castes, the scheduled tribes and women in such manners as the state legislature may by law provide. Of course, the reservation of offices of chairpersons for the scheduled castes and the scheduled tribes will cease after the cession of reservation of seats in the legislature.

The eleventh schedule covers a wide span of rural development agenda including agriculture, land improvement, implementation of land reforms, land consolidation and soil conservation, minor irrigation, water management and watershed development, fisheries, social forestry and farm forestry, minor forest produce, small scale, *khadi* (hand-spun textile) and cottage industries, rural housing, drinking water, fuel and fodder, roads, culverts, bridges, ferries, waterways and other means of communication, rural electrification, non-conventional energy sources, poverty alleviation programme, education, libraries, cultural activities, markets and fairs, health and sanitation, family welfare, women and child development, social welfare, welfare of the handicapped, the scheduled castes and scheduled tribes, public distribution system and maintenance of community assets.

The state legislatures, by law, may endow the *panchayats* to be effective instruments of self-government and may provide for devolution of powers and responsibilities upon *panchayats*, at the appropriate level, subject to specified conditions with respect to the preparation of plans for economic development and social justice and implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to matters included in the eleventh schedule. The state legislatures may, by law, also authorize the *panchayats* to levy, collect and appropriate taxes, duties, tolls and fees, assign to the *panchayats* such taxes, duties, tolls and fees subject to conditions and limits, provide for grants-in-aid

to the *panchayats* from the consolidated fund of the state, and create its own fund to credit its money to. The Governor shall constitute state finance commission every five years to review the financial position of the *panchayats* and make recommendations to the Governor as to (a) the principles which should govern (i) the distribution between the state and the *panchayats* of the net proceeds of the taxes, duties, tolls and fees leviable by the state, which may be divided between them and the allocation between the *panchayats* at all levels of their respective shares of such proceeds, (ii) the determination of the taxes, duties, tolls and fees which may be assigned to, or appropriated by, *panchayats*, and (iii) the grants-in-aid to the *panchayats* from the consolidated fund of the state; (b) the measures needed to improve the financial position of the *panchayats* and (c) any other matter referred to the commission by the Governor in the interests of sound finance of the panchayats.

The state legislatures determine the composition of such commissions and qualification of the members. The commissions determine their own procedure. The Governor causes every recommendation made by the commission, together with an explanatory memorandum as to the action taken, to be laid in the legislature. The state legislatures may, by law, make provisions with respect to the maintenance of accounts and the auditing of such accounts. These provisions are applicable to the Union territories, with suitable modifications, but not in the scheduled areas and the tribal areas. The tribal areas have their district councils for the autonomous districts and village councils/authorities at village level. In 1996, Parliament passed the Panchayat Extension to Scheduled Areas Act, for the fifth schedule areas, stipulating that a state legislation for such an area must be in consonance with customary law, social and religious practices and traditional management of community resources.

Municipalities

Direct election existed in the municipalities earlier. The novelty in the 74th amendment was structural, though minor. The amendment created a category of 'urban *panchayat*' (by whatever name called) for a rural-urban transitional area, of course to be determined by the Governor of a state. While the smaller urban local bodies would have municipal councils, the larger ones would have municipal corporations. These may not be constituted in areas declared by the Governor as industrial townships. (The military cantonments do not come under this arrangement either.) Members of the municipalities are directly elected from territorial constituencies. As in the *panchayats*, in municipalities too seats will be reserved for scheduled castes and scheduled tribes proportionate to their strength in the population. At least one thirds of the seats will be reserved for women among theirs as well as the rest of the seats. Additionally, state legislatures may provide for representation in a municipality of persons having special knowledge or experience in municipal administration, members of the House of the People and members of the legislative assembly of the state representing constituencies that partly or wholly comprise the municipal area, members of the Council of States and members of the state's legislative councils registered as electors within the municipal area and chairpersons of any special committees created by the state legislatures. The additional members have no right to vote.

The normal duration of a municipality is five years and not more. It cannot be prematurely dissolved without being granted a reasonable opportunity to be heard. It may not be dissolved by amending law midway in its duration. An election to constitute a municipality shall be completed before the expiration of the normal period or before the expiration of a period of six months from the date of its dissolution. If the remainder of the period for which the dissolved municipality

would have continued is less than six months, it will not be necessary to hold an election for constituting the municipality. A municipality constituted after the dissolution of a municipality shall continue only for the remainder of the period for which the dissolved municipality would have continued had it not been dissolved. The permissible minimum age of a member of a municipality is 21. (S)he may be disqualified on grounds that would disqualify a member of the state's legislative assembly or under any law made by the legislature of the state.

Functions allocable to municipalities per schedule XII, on the other hand, relate mainly to urban services: urban planning including town planning, regulation of land use and building construction, planning for economic and social development, roads and bridges, water supply for non-agricultural purposes, public health, sanitation, conservancy and solid waste management, fire services, urban forestry, environment and ecology, safeguarding of interests of the weaker sections, slum improvement, urban poverty alleviation, urban amenities provision, promotion of cultural, educational and aesthetic aspects, burials and burial grounds, cremation, cremation ground and electric crematoriums, cattle ponds, prevention of cruelty to animals, vital statistics, including registration of birth and death (a function about which the eleventh schedule is silent), public amenities, regulation of slaughter houses and tanneries.

The state legislature, by law, may endow the municipalities to be effective instruments of self government and may provide for devolution of powers and responsibilities upon municipalities subject to specified conditions with respect to the preparation of plans for economic development and social justice and implementation of schemes for economic development and social justice as may be entrusted to them including those in relation to matters included in the twelfth schedule. It may make provisions for maintenance of accounts

and their audit. These provisions are applicable to Union territories with suitable amendments but not in the Gorkha hill council within the Darjeeling district of West Bengal. The state government may extend the provisions to scheduled areas and tribal areas.

XVI

AMENDMENT

No law in the world can be immutable, nor any constitution can be. Yet, every constitution is enacted with a view to securing a stable political system. But in every constitution some leeway is kept for dealing with future eventualities in the form of an amendment procedure. Constitutional amendment is a constituent function. Therefore, its procedure is made different from an ordinary legislative procedure. The constitution of the USA is the most rigid constitution.

The Indian constitution, which has been amended 94 times so far, is far less rigid than the constitution of the USA. Right from the beginning, Article 368 divided the articles of the constitution into two parts. Most of the articles were made amendable by a procedure that required the votes of a majority of total membership in each house and at least two-thirds of the members present and voting plus the assent of the President. There is no provision for joint sittings of the two Houses in case of their disagreement on an amendment and the bill must be passed separately by the two Houses. Some articles, additionally, require the ratification of a majority of the state legislatures. These special articles are Articles 54 (election of the President), 55 (manner of the President's election), 73 (extent of executive power of the Union), 162 (extent of executive power of states) and 241 (High Courts for Part C states, now Union territories); all the articles in chapter IV of Part V (the Union judiciary), chapter V of Part VI (High

Courts in the states), chapter I of Part X (Union-state relations); representation of states in Parliament; and the provisions of this article (Article 368), besides the lists in the seventh schedule.

There is a third kind of articles that can be changed by an ordinary majority in Parliament and their change will not be deemed to be amendment under Article 368. Thus, Article 2 empowers Parliament to, by law, admit into the Union, or establish, new states on such terms and conditions as it thinks fit. Article 3 empowers Parliament to, by law, (a) form a new state by separation of territory from any state or by uniting two or more states or parts of states, or by uniting any territory to a part of any state; (b) increase the area of any state; (c) diminish the area of any state; (d) alter the boundaries of any state; (e) alter the name of any state; provided that such a bill has been moved on the recommendation of the President after taking the views of the legislature(s) of the concerned state(s). Further, any law referred to in Articles 2 and 3 shall contain provisions for the amendment of the first schedule (enlisting the states) and the fourth schedule (laying down the allocation of seats in the Council of States) and any supplemental and consequential provisions, including provisions about representation of the affected states in Parliament and state legislature(s) as Parliament deems necessary. But the law proposing amendment to the fourth schedule would be subject to the special procedure as it involves representation of states in the Parliament.

The Governor of Assam (and, now, Meghalaya, Mizoram and Tripura as well) was given the power to amend the sixth schedule by way of including and excluding territories into, altering the territorial boundaries of, creating, splitting and uniting the autonomous districts/regions in the state.

One of the ironies of the amendment provision in the Indian constitution is that it has been subjected to amendment

itself. The *Golak Nath* case (1967) had three major rulings: (1) Parliament has no constituent power as it was not granted by the original Article 368 which had spoken of 'procedure of amendment'; (2) the procedure was that of ordinary legislations as it required the assent of the President; and (3) Article 13 of the constitution had prohibited any law taking away or abridging any fundamental right granted in Part III. The 24th amendment in 1971, therefore, made two significant changes in the constitution: (1) amending Article 13 by adding a fourth clause saying, 'Nothing in this article shall apply to any amendment of this constitution made under Article 368;' and (2) amending Article 368—(a) altering the marginal sub-heading from 'procedure of amendment' to 'power of Parliament to amend the constitution', (b) making it mandatory for the President to sign a bill for amendment passed by the Houses thus making the amendment procedure different from ordinary legislative procedure, and (c) adding that nothing in Article 13 shall apply to any amendment made under this article.'

The *Keshavananda* judgement (1973) partly restored the constituent power of Parliament, but, on the whole took it away in respect of the basic features. The 42nd amendment (1976) challenged the *Keshavananda* judgement head on by further amendment of Article 368 laying down that (a) no amendment of the constitution (including the provisions of Part III) made or purported to have been made under this article ... shall be called in question in any court on any ground [Clause (4)]; and (b) for the removal of any doubts, it was declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this constitution under this article [Clause (5)]. In *Minerva Mills Ltd v. the Union of India* (1980) clauses (4) and (5) were declared void as they sought to take away judicial review, a basic feature of the

constitution. The only limitation to Parliament's power of amendment today is the unspecified number of basic features of which judicial review is one.

94 amendments in 58 years of the constitution may appear excessive. One may cite for comparison the US constitution containing only seven articles that has been amended 27 times in about 220 years. Statistically, India will not be very different in the ratio between the number of articles and the number of amendments over years. Yet the number of amendments of India's constitution needs explanation.

The main reason of the excessive number of amendments is the detailed character of the constitution originally containing 395 articles and eight schedules. While the US constitution laid down the skeleton of only the federal government, the Indian constitution, right at the origin, laid down the structures of the Union government and the state governments with the special features like the different kinds of autonomy of Jammu and Kashmir, the scheduled areas and the tribal areas. Local government came in later. The colonial experience and the trauma of partition rendered an amount of insecurity and apprehension while the nationalist struggle offered a welfarist vision. The constitution makers wanted to chart out a cock-sure future and leave little for judicial creativity or legislative innovation. The fast pace of change in post-war and post-independent India, however, did not allow these certainties.

Trends in Amendment of the Indian Constitution

Major amendments were called forth one year after the commencement of the constitution. The very first amendment (1951) attacked the liberal values in Article 19 (freedom) and 31 (property). Simultaneously, it initiated affirmative action for the scheduled castes and the scheduled tribes by adding Clause (4) to Article 15. Importantly, it opened up the

possibility of circumscribing the right to property, with a view to land reform, by setting up the ninth schedule, beyond the scope of judicial review. There were minor changes about the state legislature, besides an extension of one year to the President's power to issue 'removal of difficulties' orders. The second amendment (1952) removed the maximum limit to the constituency of a member of the House of the People. The third amendment (1954) enlarged entry 33 of the concurrent list to the Union government's advantage. The fourth amendment (1955) curtailed right to property and expanded the ninth schedule. The fifth amendment (1955) enabled the President to set time limit for the state legislatures to express their view on their territorial reorganization. The sixth amendment (1956) enhanced the Union's power of taxation under the seventh schedule. The seventh amendment (1956) related to states reorganization and was extensive. The eighth amendment (1960) extended reservation of legislative seats for scheduled castes and scheduled tribes by ten years. The ninth amendment (1960) gave effect to territorial adjustments with Pakistan. The tenth amendment (1961) gave Dadra and Nagar Haveli, former territorial possessions of Portugal, Union territory status. The eleventh amendment (1962) slightly altered the mode of election of the Vice-President of India and ensured that the election of a President or a Vice-President shall not be called in question because of any vacancy in their electorates. Acquisition of Goa, Daman and Diu led to conferment of the status of a Union territory on them by the twelfth amendment (1962). Creation of the state of Nagaland required the thirteenth amendment in 1962. Peaceful transfer of the French possessions in south India led to the conferment of the status of a Union territory on Pondicherry (along with Karikal, Mahe and Yanam) by the fourteenth amendment (1962) which also empowered Parliament to create by law legislative assemblies in the Union territories of Himachal

Pradesh; Manipur; Tripura; Goa, Daman and Diu; and Pondicherry.

The multi-cornered fifteenth amendment (1963) empowered Parliament to provide, by law, for the authority that would determine the age of the judges of the Supreme Court, raised the upper age limit of the High Court judges, protected financial interests of the High Court judges on transfer, provided for temporary recruitment of judges in the High Courts, and conferred some extra-territorial jurisdiction on the writ-issuing power of the High Court, extending the state's power over continental shelf, providing additional security to government servants and modification of terms of working of the public service commissions. The 16th amendment (1963) was concerned with the sovereignty and integrity of India in the context of secessionist movements in different parts of the country. The 17th amendment (1964) expanded the definition of estates and the ninth schedule resulting in the *Golak Nath* case that ushered in the critical debates on constitutional amendment.

The 18th amendment (1966) specified that Parliament's power to alter territories of states encompassed the Union territories too. The 19th amendment (1966) took away from the Election Commission power to appoint election tribunals. The 20th amendment undid the judgements of the Supreme Court and some High Courts on appointment and transfer of some district court judges that had created a judicial-administrative chaos. By the 21st amendment (April 1967) the Sindhi language was included in the eighth schedule.

For nearly two-and-a-half years thereafter there was no amendment. The 22nd amendment in September 1969 and the 23rd amendment in the same year were called for by the creation of the autonomous state of Meghalaya within Assam, much of which became redundant with the reorganization of northeast India two years later. Reservation for scheduled castes

and scheduled tribes in legislature was extended for another ten years. The 24th amendment was the reply of Parliament to the *Golak Nath* judgement. It amended Article 13 to separate it from Article 368, spelled out that Article 368 granted the power of amendment to Parliament and bound the President to assent to an amendment bill passed in the Union legislature and ratified by state legislatures as and when necessary. Right to property was further curbed by the 25th amendment (1971) and Article 31C was inserted saving the directive principles that relate to the state securing the ownership and control of material resources of the country to sub-serve the common good and the operation of the economic system so as not to allow concentration of wealth and means of production to the common detriment against the fundamental rights, in Part III of the constitution, .of equality (Article 14), freedom (Article 19), and property (Article 31), and to make a claim to that intent beyond judicial review. This preclusion from judicial scrutiny was invalidated in *Keshavananda.** The 26th amendment (1971) was required for the abolition of privy purses and princely privileges. It got the presidential assent before the 25th amendment. Grant of full statehood to Manipur and the elevation in the status of Delhi and Pondicherry called for the 27th amendment in 1971 too. Depletion of government servants of the pre-independence period led to the revision of the terms of services of the remaining ones and the pension for the retired ones led to the 28th amendment (1972). Amendments 26 and 27 may be said to have terminated independent India's final links with the British empire.

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* The 42nd amendment was to later delete Article 31 after judges said in *Keshavananda* that right to property was not a basic feature of the constitution and, in fact, should not be a fundamental right.

The 29th amendment (1972) enlarged the ninth schedule. The 30th amendment (1973) dropped the provision of right to appeal to the Supreme Court in cases involving property of high value (Rs 20,000). The 31st amendment (1973) slightly altered the composition of the House of the People and extended reservation for scheduled castes and scheduled tribes in the legislatures. The 32nd amendment (1973) made special provisions for regions in Andhra Pradesh and the setting up of a central university at Hyderabad. A massive political agitation in Gujarat in 1974 (*navanirman*) forcing elected legislators to resign led to the 33rd amendment in the same year requiring the Speaker/Chairman of a House to enquire and satisfy herself/himself that the resignation is genuinely voluntary. The 34th amendment (1974) enlarged the ninth schedule. Association of Sikkim with India caused the 35th amendment in February1975, only to be superseded by the 36th amendment in May that year incorporating it as a full state of the Indian Union, the amendment having come into effect immediately after its passing the two Houses, even before it was assented to by the President. The tenth schedule set up by the 35th amendment to lay down the governmental structure of the associated state of Sikkim was omitted by the 37th amendment that came into effect after a week of the commencement of the 36th amendment.

During the emergency five amendment Acts (the 38th to the 42nd) were passed. Most of them were undone by the 43rd (13.04. 1978) and the 44th (30.04.1979) amendments either by cancellation or by suitable amendments. Some, however, were retained, like the general goal of secular socialism and the specific goal of unity and integrity of the nation in the Preamble, the fundamental duties of the citizens, extension of the immunity of the directive principles from Articles 14, 19 and 21 to that from all directive principles in Article 31C, and setting up of administrative and other tribunals. The 44th

amendment made some innovations too, like the shifting of the right to property from the fundamental rights part to a different one and allowing the President and the governors to return a ministerial advice once, a power that had been denied by the 42nd amendment. Its positive contribution was towards curtailing the provision for preventive detention and restricting the emergency power of the President more than what obtained in the original constitution.

The 45th amendment extended reservation for the scheduled castes and the scheduled tribes. The 46th amendment (1983) related to inter-state sales tax. The 47th amendment (1984) extended the ninth schedule. The 48th amendment (1984) enabled the extension of President's rule in Punjab. The 49th amendment (1984) related to the sixth schedule operating in northeast India including the introduction of the sixth schedule in Tripura. The 50th amendment related to the rights of the armed forces among whom many other forces were included. The 51st amendment (1985) concerned the organization of the seats reserved for the scheduled tribes. The anti-defection law (the new tenth schedule) came with the 52nd amendment in 1985. Following a political agreement with some Mizo leaders Mizoram was constituted as a state by the State of Mizoram Act, 1986 and the 53rd amendment was made in the same year. Emoluments of the President and the Governors were revised, and provision was made for revision of the emoluments of the Supreme Court and the High Court judges by the 54th amendment in the same year. Arunachal Pradesh was conferred statehood by the State of Arunachal Pradesh Act, 1986 and the 55th amendment took place in the same year. The 56th amendment divided the Union territory of Goa, Daman and Diu, turned Goa into a state and retained Daman and Diu as one Union territory (without a state legislature) in 1987. The 57th amendment (1987) reserved the seats of Arunachal Pradesh,

Meghalaya, Mizoram, Nagaland in the legislative assemblies on a formula that, if all the seats in any assembly were held by only scheduled tribes at the time of the amendment, then all but one seats would be reserved for them. Otherwise, the reservation should bear true proportion to the population ratio between the scheduled tribes and the others.

The 58th amendment (1987) was about the publication of a Hindi translation of the Indian constitution. Continuing violence in Punjab called for continuation of emergency there for five years. That was secured by the 59th amendment (1988).The 60th amendment of the same year raised the ceiling of profession tax. Voting age was lowered by the 61st amendment in 1989. The 62nd amendment (1990) extended reservation for scheduled castes and scheduled tribes. By the 63rd amendment (1990) steps were taken to lift emergency in Punjab. But, as things did not improve much, a further extension of the emergency by six months beyond three years was allowed by the 64th amendment (1990). By the 65th amendment (1990) the national commission for scheduled castes and scheduled tribes was set up. The 66th amendment expanded the ninth schedule. President's rule in Punjab was further extended by two successive amendments (67th in 1990 and 68th in 1991) to five years. The 69th amendment (1991) granted the Union territory of Delhi a legislative assembly and a council of states. Members of the legislative assemblies of the Union territories of Delhi and Pondicherry were included in the President's electorate by the 70th amendment (1992).

The 71st amendment (1992) expanded the eighth schedule. Reservation of seats for the scheduled tribes in Tripura state legislature was frozen till after the census following 2026 by the 72nd amendment (1992). The 73rd and the 74th amendments passed on the same day (24.04.1993) restructured the rural and the urban self-government systems. The 75th amendment (1994) expanded the scope of tribunals. The 76th

amendment (1994) added but one legislation to the ninth schedule. The 77th amendment (1995) added Clause (4A) to Article 16. The 78th amendment enlarged the ninth schedule. The 79th amendment extended reservation in legislatures for scheduled castes and scheduled tribes by ten years. The 80th amendment (2000) radically altered the pattern of revenue sharing between the Union and the states. The 81st amendment (2000) allowed cumulative backlog vacancies in government services out of the reservation for the scheduled castes and the scheduled tribes to be filled up. The 82nd amendment (2000) allowed relaxation of qualifying marks in examinations for government services for the scheduled castes and the scheduled tribes. Reservation of *panchayat* seats for the scheduled castes and scheduled tribes in Arunachal Pradesh was ruled out by the 83rd amendment (2000). The 84th amendment (2002) froze the revision of population figures for electoral purposes till the census following 2026. The 85th amendment (2002) extended for the scheduled castes and the scheduled tribes the benefit of cumulative filling up of promotional posts. The 86th amendment (2002) shifted the directive principle of state policy (Article 45) about free and compulsory education of children between the ages of 6 and 14 to fundamental right (Article 25A), revised it (virtually creating a new directive principle) for early childhood care and education, and added a fundamental duty to parents to facilitate education of children. The base for population calculation toward freezing the delimitation of constituencies laid down in the 84th amendment was fixed at 2001 by the 87th amendment (2003). The 88th amendment (2003) created the service tax and arranged its collection and appropriation. The 89th amendment split the national commission for the scheduled castes and scheduled tribes into two, one for the scheduled castes and another for the scheduled tribes. The 90th amendment (2003) related to the division between the

scheduled tribes and the non-scheduled tribes representation to the Bodoland Territorial Council in Assam.

The 91st amendment (2003) limited the number of ministers at the Union and at the states, imposed a disqualification for appointment to remunerative political posts of those disqualified under the tenth schedule, and dropped split as an exception to the law of disqualification of legislators from the tenth schedule. The 92nd amendment expanded the eighth schedule. The 93rd amendment (2005) added a new clause [Clause (5)] to Article 15 empowering the state to reserve seats in the institutions of higher education for the backward classes, including the scheduled castes and the scheduled tribes. The 94th amendment (2006) required Chhattisgarh and Jharkhand state council of ministers to each have a minister for tribal affairs. .

A brief review of the amendments over the years hitherto made will show that very few of them have been of major significance. There have been five, almost routine, amendments of the provisions about reservation of seats in legislatures for the scheduled castes and the scheduled tribes. States reorganization produced two kinds of amendment, the formal ones, by special procedures, and the consequential ones, by ordinary procedures by virtue of Article 3. Formal amendments have been 17 in number (amendments no. 7, 9, 10, 12, 13, 14, 18, 22, 27, 32, 35, 36, 43, 44, 53, 55 and 56), that is, without counting the amendments about up-gradation of Union territories. Beginning with the creation of the Andhra state in 1953, on the other hand, every states reorganization has resulted in consequential changes in the first and the fourth schedule without formal amendment. Creation and alteration in the scheduled areas by presidential orders and of tribal areas by gubernatorial orders have affected the fifth and the sixth schedules. A very large number of amendments relates to castes, indicating the social dynamics in independent India.

A few lessons may perhaps be drawn from this brief survey of amendments. There appears to have been a bit of *ad hocism* and hurry behind several amendments as in the case of Sikkim. Verbosity, mixed with bureaucratic zeal is discernible in the 24th amendment when Articles 13 and 368 were simultaneously and reciprocally amended to have the same effect. Amendments no 38 to 42 are, of course, less bona fide. Governments should have been by now convinced that no dilution of judicial review will pass the Supreme Court. In any case, there is a need for renumbering of the articles as many others have become defunct or have been removed from the body of the constitution.

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